CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 36 JANUARY 30, 2002 NO. 5

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 12–2001)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of November 2001. The last notice was published in the CUSTOMS BULLETIN on December 19, 2001.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1300 Pennsylvania Avenue, N.W., Ronald Reagan Building, 3rd floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Joanne Roman Stump, Chief, Intellectual Property Rights Branch, (202) 927–2330.

Dated: December 21, 2001.

JOANNE ROMAN STUMP,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

12/04/01 U.S. CUSTOMS SERVICE PAGE 1
07:27:10 IPR RECORDATIONS ADDED IN NOVEMBER 2001 DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP0100164	20011130	20121130	BRONCO CIGARETTES	ROBERT GIELCHINSKY	N
SUBTOTAL RECORDATION TYPE			1		
TMK0100541	20011101	20100328	STOLICHNAYA LIMONNAYA VODKA	ALLIED DOMECQ INT'L HOLDINGS BV	N
TMK0100542	20011101	20091116	STOLICHNAYA OHRANJ	ALLIED DOMECQ INT'L HOLDINGS BV	N
TMK0100543	20011101	20060723	STOLICHNAYA OHRANJ	ALLIED DOMECQ INT'L HOLDINGS BV	N
TMK0100544	20011101	20080721	STOLI RAZBERI	ALLIED DOMECQ INT'L HOLDINGS BV	N
TMK0100545	20011101	20081124	STOLI STRASBERI	ALLIED DOMECQ INT'L HOLDINGS, BV	N
TMK0100546	20011101	20100828	DESITIN	PFIZER INC.	N
TMK0100547	20011106	20051128	LV	LOUIS VUITTON MALLETIER	N
TMK0100548	20011106	20060806	LOUIS VUITTON	LOUIS VUITTON MALLETIER	N
TMK0100549	20011106	20110602	ROCA	BROWN & HALEY	N
TMK0100550	20011106	20080818	ROUND FLOWER	LOUIS VUITTON MALLETIER	N
TMK0100551	20011106	20080804	POINTY FLOWER	LOUIS VUITTON MALLETIER	N
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TMK0100556	20011107	20030705	STOLI	ALLIED DOMECQ INT'L HOLDINGS BV	N
TMK0100557	20011107	20090919	PRIVIET	ALLIED DOMECQ INT'L HOLDINGS BV	N
TMK0100558	20011107	20041016	CHAOKOH (AND DESIGN)	THEP PADUNG PORN COCONUT CO. LTD	N
TMK0100559	20011107	20041106	RECOTON	RECOTON CORPORATION	N
TMK0100560	20011107	20050110	CANE DESIGN	CHRISTIAN DIOR COUTURE, S.A.	N
TMK0100561	20011107	20100905	CHANEL CLASSIC BOTTLE	CHANEL, INC.	N
TMK0100562	20011115	20050628	CREST	THE PROCTER & GAMBLE COMPANY	N
TMK0100563	20011115	20110508	CREST	THE PROCTER & GAMBLE COMPANY	N
TMK0100564	20011116	20050207	SOLJAH	ALIKA HAMMOND WINTER	N
TMK0100565	20011119	20100422	LUGER	STOEGER, INC.	N
TMK0100566	20011120	20110118	AR	RECOTON AUDIO CORPORATION	N
TMK0100567	20011123	20040921	WAYFARER	LUXOTTICA LEASING S.P.A.	N
TMK0100568	20011123	20081101	RAY-BAN	LUXOTTICA LEASING S.P.A.	N
TMK0100569	20011123	20070820	RAY BAN STYLIZED	LUXOTTICA LEASING S.P.A.	N
TMK0100570	20011123	20050219	RAY-BAN IN SLANTED SCRIPT WITH SERRATED	LUXOTTICA LEASING S.P.A.	N
TMK0100571	20011123	20080103	RAY-BAN	LUXOTTICA LEASING S.P.A.	N
TMK0100572	20011123	20110306	ROCAWEAR	COMET INTERCONTINENTAL, INC.	N
TMK0100573	20011127	20110820	CC MONOGRAM DESIGN	CHANEL INC.	N
TMK0100574	20011129	20100801	STUSSY	STUSSY, INC.	N
TMK0100575	20011130	20111117	AMERICAN EXPRESS WORLD SERVICE DESIGN	AMERICAN EXPRESS COMPANY	N
TMK0100576	20011130	20090112	AE	RETAIL ROYALTY COMPANY	N
TMK0100577	20011130	20070812	AMERICAN EAGLE OUTFITTERS	RETAIL ROYALTY COMPANY	N
TMK0100578	20011130	20110514	HIVID	HOFFMANN-LA ROCHE	N
TMK0100579	20011130	20071215	NORVASC	PFIZER INC.	N
TMK0100580	20011130	20020728	ZOLOFT	PFIZER INC.	N
TMK0100581	20011130	20020721	ZITHROMAX	PFIZER INC.	N
TMK0100582	20011130	20080920	DIFLUCAN	PFIZER INC.	N
TMK0100583	20011130	20101113	GAME BOY	NINTENDO OF AMERICAN INC.	N
TMK0100584	20011130	20091130	RADIA	RADIA MEDICAL IMAGING INC.	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES

SUBTOTAL RECORDATION TYPE 44

TOTAL RECORDATIONS ADDED THIS MONTH 45

DISTRIBUTION OF CONTINUED DUMPING AND SUBSIDY OFFSET TO AFFECTED DOMESTIC PRODUCERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of intent to distribute offset for Fiscal Year 2001.

SUMMARY: Pursuant to the Continued Dumping and Subsidy Offset Act of 2000, this document is Customs notice of intention to distribute assessed antidumping or countervailing duties (known as the continued dumping and subsidy offset) for Fiscal Year 2001 in connection with certain antidumping duty orders or findings or countervailing duty orders that were not previously listed in the notice of intent to distribute the offset for Fiscal Year 2001 that was published in the Federal Register on August 3, 2001. This document sets forth those additional antidumping duty orders or findings and countervailing duty orders that were not previously listed, together with the affected domestic producers associated with each order or finding who are potentially eligible to receive a distribution. This document also provides the instructions for affected domestic producers to file written certifications to claim a distribution in relation to the listed orders or findings and the dollar amount of the offset for each order or finding that is available for distribution.

DATES: Written certifications to obtain a continued dumping and subsidy offset under a particular order or finding must be received by March 18, 2002.

ADDRESSES: Written certifications should be addressed to: Assistant Commissioner, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, NW., 3rd Floor, Washington, D.C. 20229 (ATTN: Jeffrey J. Laxague).

FOR FURTHER INFORMATION CONTACT: Jeffrey J. Laxague, Office of Regulations and Rulings, (202–927–0505).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA") was enacted on October 28, 2000, as part of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001 ("Act"). The provisions of the CDSOA are contained in Title X (sections 1001–1003) of the Act.

The CDSOA, in section 1003 of the Act, amended Title VII of the Tariff Act of 1930, by adding a new section 754 (codified at 19 U.S.C. 1675c) in order to provide that assessed duties received pursuant to a countervailing duty order, an antidumping duty order, or an antidumping duty

finding under the Antidumping Act of 1921, must be distributed to affected domestic producers for certain qualifying expenditures that these producers incur after the issuance of such an order or finding. The term "affected domestic producer" means any manufacturer, producer, farmer, rancher or worker representative (including associations of such persons) that—

(A) Was a petitioner or interested party in support of a petition with respect to which an antidumping order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and

(B) Remains in operation.

The distribution that these parties may receive is known as the continued dumping and subsidy offset.

LIST OF ORDERS OR FINDINGS AND AFFECTED DOMESTIC PRODUCERS

It is the responsibility of the U.S. International Trade Commission (USITC) to ascertain and timely forward to Customs a list of the affected domestic producers that are potentially eligible to receive an offset in connection with an order or finding.

To this end, it is noted that the USITC previously supplied Customs with the list of individual antidumping and countervailing duty cases for Fiscal Year 2001, and the affected domestic producers associated with each case that were potentially eligible to receive an offset. These cases were the subject of a notice of intent to distribute the continued dumping and subsidy offset for Fiscal Year 2001 that was published in the Federal Register (66 FR 40782) on August 3, 2001.

However, a number of antidumping and countervailing duty cases were not included on the previously-supplied list of cases that were subject to a distribution of the continued dumping and subsidy offset for Fiscal Year 2001. Accordingly, this notice essentially constitutes a supplement to the August 3, 2001, Federal Register notice for the purpose of listing the additional antidumping duty orders or findings or countervailing duty orders that are subject to a distribution of the offset for Fiscal Year 2001.

CUSTOMS REGULATIONS IMPLEMENTING THE CDSOA

It is noted that Customs published a final rule in the Federal Register (66 FR 48546) on September 21, 2001, as T.D. 01–68, which was effective as of that date, in order to implement the CDSOA. The final rule added a new subpart F to part 159 of the Customs Regulations (19 CFR part 159, subpart F (§§ 159.61–159.64)).

NOTICE OF INTENT TO DISTRIBUTE OFFSET

This document announces Customs intention to distribute to affected domestic producers the assessed antidumping or countervailing duties that were available for distribution in Fiscal Year 2001 in connection with those antidumping duty orders or findings or countervailing duty orders that are listed in this document. While § 159.62(a), Customs Regulations (19 CFR 159.62(a)), provides that Customs will publish a notice of intention to distribute assessed duties at least 90 days before the end

of a fiscal year, this notice is being published at this time because it came to Customs attention that not all parties were listed in the original notice. In the future, it is not expected that supplemental notices of intent will be published.

CERTIFICATIONS; SUBMISSION AND CONTENT

To obtain a distribution of the offset under a given order or finding, an affected domestic producer must submit a certification to Customs, indicating that the producer desires to receive a distribution.

As required by § 159.62(b), Customs Regulations (19 CFR 159.62(b)), this notice provides the specific instructions for filing a certification under § 159.63 to claim a distribution. Also, as required by § 159.62(b), for purposes of determining whether it is worthwhile to file a certification in a given case, this notice includes the dollar amount for each listed order or finding that is available for distribution.

A successor to a company appearing on the list of affected domestic producers in this notice, or a member company of an association that appears on the list of affected domestic producers in this notice, where the member company does not appear on the list, should also consult § 159.61(b)(1)(i) or 159.61(b)(1)(ii), Customs Regulations, respectively (19 CFR 159.61(b)(1)(i) or 159.61(b)(1)(ii)), concerning whether and, if so, the additional procedures under which such party may file a certification to claim an offset.

Specifically, to obtain a distribution of the offset under a given order or finding, each affected domestic producer must timely submit a certification, in triplicate, to the Assistant Commissioner, Office of Regulations and Rulings, Headquarters, containing the required information detailed below as to the eligibility of the producer to receive the requested distribution and the total amount of the distribution that the producer is claiming. The certification must enumerate the qualifying expenditures incurred by the domestic producer since the issuance of an order or finding and it must demonstrate that the domestic producer is eligible to receive a distribution as an affected domestic producer.

As provided in § 159.63(b), Customs Regulations (19 CFR 159.63(b)), certifications to obtain a distribution of an offset must be received by Customs 60 days after the date of publication of the notice of intent in the Federal Register.

While there is no established format for a certification, the certification must contain the following information:

1. The date of this Federal Register notice;
2. The Commerce case number;
3. The case name (Product/country);
4. The name of the domestic producer and any name qualifier, if applicable (for example, any other name under which the domestic producer does business or is also known);
5. The address of the domestic producer (if a post office box, the secondary street address must also be included);

6. The Internal Revenue Service (IRS) number (with suffix) of the domestic producer, employer identification number, or social security number, as applicable;

7. The specific business organization of the domestic producer (corporation, partnership, sole proprietorship);

8. The name(s) of any individual(s) designated by the domestic producer as the contact person(s) concerning the certification, together with the phone number(s) and/or facsimile transmission number(s) and electronic mail (email) address(es) for the person(s);

9. The total dollar amount claimed;

10. The dollar amount claimed by category, as described in the section below entitled "Amount Claimed for Distribution";

11. A statement of eligibility, as described in the section below entitled "Eligibility to Receive Distribution"; and

12. A signature by a corporate officer legally authorized to bind the producer.

Amount Claimed for Distribution

In calculating the amount of the distribution being claimed as an offset, the certification must enumerate the total amount of qualifying expenditures certified by the domestic producer, and the amount certified by category.

Qualifying expenditures which may be offset by a distribution of assessed antidumping and countervailing duties encompass those expenditures that are incurred after the issuance of an antidumping duty order or finding or a countervailing duty order, and prior to its termination, provided that such expenditures fall within any of the following categories: (1) Manufacturing facilities; (2) Equipment; (3) Research and development; (4) Personnel training; (5) Acquisition of technology; (6) Health care benefits for employees paid for by the employer; (7) Pension benefits for employees paid for by the employer; (8) Environmental equipment, training, or technology; (9) Acquisition of raw materials and other inputs; and (10) Working capital or other funds needed to maintain production.

Additionally, these expenditures must be related to the production of the same product that is the subject of the order or finding, with the exception of expenses incurred by associations which must relate to a specific case (§ 159.61(c), Customs Regulations (19 CFR 159.61(c))).

Eligibility to Receive Distribution

As noted, the certification must contain a statement that the domestic producer desires to receive a distribution and is eligible to receive the distribution as an affected domestic producer.

Where a party is listed as an affected domestic producer on more than one order or finding covering the same product and files a separate certification for each order or finding using the same qualifying expenditures as the basis for distribution in each case, each certification must list all the other orders or findings where the producer is claiming the

same qualifying expenditures (§ 159.63(b)(3)(ii), Customs Regulations (19 CFR 159.63(b)(3)(ii))).

Moreover, as required by 19 U.S.C. 1675c(b)(1) and § 159.63(b)(3)(iii), the statement must include information as to whether the domestic producer remains in operation and continues to produce the product covered by the particular order or finding under which the distribution is sought. If a domestic producer is no longer in operation, or no longer produces the product covered by the order or finding, the producer would not be considered an affected domestic producer entitled to receive a distribution.

In addition, as required by 19 U.S.C. 1675c(b)(5) and § 159.63(b)(3)(iii), the domestic producer must state whether it has been acquired by a company or business that is related to a company that opposed the antidumping or countervailing duty investigation that resulted in the order or finding under which the distribution is sought. If a domestic producer has been so acquired, the producer would again not be considered an affected domestic producer entitled to receive a distribution.

The certification must be executed and dated by a party legally authorized to bind the domestic producer and it must state that the information contained in the certification is true and accurate to the best of the certifier's knowledge and belief under penalty of law, and that the domestic producer has records to support the qualifying expenditures being claimed (see section below entitled "Verification of Certification").

Review and Correction of Certification

A certification that is submitted in response to this notice of distribution may be reviewed before acceptance to ensure that all informational requirements are complied with and that any amounts set forth in the certification for qualifying expenditures, including the amount claimed for distribution, appear to be correct. A certification that is found to be materially incorrect or incomplete will be returned to the domestic producer, as provided in § 159.63(c), Customs Regulations (19 CFR 159.63(c)). It is the sole responsibility of the domestic producer to ensure that the certification is correct, complete and satisfactory so as to demonstrate the entitlement of the domestic producer to the distribution requested. Failure to ensure that the certification is correct, complete and satisfactory will result in the domestic producer not receiving a distribution.

Verification of Certification

Certifications are subject to Customs verification. Because of this, parties are required to maintain records supporting their claims for a period of three years after the filing of the certification (see § 159.63(d), Customs Regulations (19 CFR 159.63(d))). The records must be those that are normally kept in the ordinary course of business; these records must support each qualifying expenditure enumerated in the certification; and they must support how the qualifying expenditures are deter-

mined to be related to the production of the product covered by the order or finding.

DISCLOSURE OF INFORMATION IN CERTIFICATIONS; ACCEPTANCE BY PRODUCER

The name of the affected domestic producer, the total dollar amount claimed by that party on the certification, as well as the total dollar amount that Customs actually disburses to that company as an offset, will be available for disclosure to the public, as specified in § 159.63(e), Customs Regulations (19 CFR 159.63(e)). To this extent, the submission of the certification is construed as an understanding and acceptance on the part of the domestic producer that this information will be disclosed to the public. Alternatively, a statement in a certification that this information is proprietary and exempt from disclosure will result in Customs rejection of the certification.

LIST OF ORDERS OR FINDINGS AND RELATED DOMESTIC PRODUCERS

The list of individual antidumping duty orders or findings and countervailing duty orders is set forth below, together with the affected domestic producers associated with each order or finding that are potentially eligible to receive an offset. Also, the amount of the offset available for distribution with respect to each listed order or finding appears in parentheses immediately below the Commerce case number for the order or finding.

Commerce Case Number	*Commission Case Number*	*Product/Country*	*Petitioners/Supporters*
A–588–015 ($24,311,452.01)	AA 1921–66	Television receivers/Japan	AGIV (U.S.A.) Casio Computer CBM America Citizen Watch Funai Electric Hitachi Industrial Union Department, AFL-CIO Matsushita Mitsubishi Electric NEC Orion Electric J.C. Penney Philips Electronics Philips Magnavox P.T. Imports Sanyo Sharp Toshiba Toshiba America Consumer Products Victor Company of Japan Montgomery Ward Zenith Electronics

Commerce Case Number	*Commission Case Number*	*Product/Country*	*Petitioners/Supporters*
A–580–008 ($45,669.05)	731–TA–134	Color television receivers/Korea	Independent Radionic Workers of America International Brotherhood of Electrical Workers International Union of Electrical Radio and Machine Workers Industrial Union Department, AFL-CIO Committee to Preserve American Color Television (members were the 4 labor organizations identified above and Allied Industrial Workers of America, International Union; American Flint Glass Workers Union of North America; Communications Workers of America; Corning Glass Works; Glass Bottle Blowers' Association of the United States and Canada; International Association of Machinists; Owens-Illinois; United Furniture Workers of America; United Steelworkers of America; and Wells-Gardner Electronics)
A–583–009 ($1,025.82)	731–TA–135	Color television receivers/Taiwan	Independent Radionic Workers of America International Brotherhood of Electrical Workers International Union of Electrical, Radio and Machine Workers Industrial Union Department, AFL-CIO

Commerce Case Number	*Commission Case Number*	*Product/Country*	*Petitioners/Supporters*
			Committee to Preserve American Color Television (members were the 4 labor organizations identified above and Allied Industrial Workers of America, International Union; American Flint Glass Workers Union of North America; Communications Workers of America; Corning Glass Works; Glass Bottle Blowers' Association of the United States and Canada; International Association of Machinists; Owens-Illinois; United Furniture Workers of America; United Steelworkers of America; and Wells-Gardner Electronics)
A–122–006 ($13,533.77)	AA1921–49	Steel jacks/ Canada	No petition at the Commission; Commerce service list identifies: Bloomfield Manufacturing (formerly Harrah Manufacturing) Seaburn Metal Products
A–588–029 ($65,301.74)	AA1921–85	Fish netting of manmade fiber/ Japan	No petition at the Commission; Commerce service list identifies: Jovanovich Supply LFSI Trans-Pacific Trading
A–588–038 ($168,261.66)	AA1921–98	Bicycle speedometers/Japan	No petition at the Commission; Commerce service list identifies: Avocet Cat Eye Diversified Products N.S. International Sanyo Electric Stewart-Warner
A–588–055 ($53.99)	AA1921–154	Acrylic sheet/ Japan	Polycast Technology

Commerce Case Number	*Commission Case Number*	*Product/Country*	*Petitioners/Supporters*
C–351–037 ($2,471.93)	104–TAA–21	Cotton yarn/ Brazil	Harriet & Henderson Yarns LaFar Industries American Yarn Spinners Association
A–588–005 ($572.91)	731–TA–48	High power microwave amplifiers/ Japan	Aydin MCL
A–122–401 ($256.98)	731–TA–196	Red raspberries/ Canada	Rader Farms Ron Roberts Shuksan Frozen Food Northwest Food Producers' Association Oregon Caneberry Commission Red Raspberry Member Group Washington Red Raspberry Commission
A–588–405 ($49,294.92)	731–TA–207	Cellular mobile telephones/ Japan	E.F. Johnson Motorola
C–421–601 ($407.22)	701–TA–278	Fresh cut flowers/ Netherlands	Burdette Coward Gold Coast Uanko Nursery Hollandia Wholesale Florist Manatee Fruit Monterey Flower Farms Topstar Nursery California Floral Council Floral Trade Council Florida Flower Association
A–301–602 ($32,909.01)	731–TA–329	Fresh cut flowers/ Colombia	Burdette Coward Gold Coast Uanko Nursery Hollandia Wholesale Florist Manatee Fruit Monterey Flower Farms Topstar Nursery California Floral Council Floral Trade Council Florida Flower Association
A–331–602 ($385.01)	731–TA–331	Fresh cut flowers/ Equador	Burdette Coward Gold Coast Uanko Nursery Hollandia Wholesale Florist Manatee Fruit Monterey Flower Farms Topstar Nursery California Floral Council Floral Trade Council Florida Flower Association

Commerce Case Number	*Commission Case Number*	*Product/Country*	*Petitioners/Supporters*
A–201–601 ($24,291.74)	731–TA–333	Fresh cut flowers/Mexico	Burdette Coward Gold Coast Uanko Nursery Hollandia Wholesale Florist Manatee Fruit Monterey Flower Farms Topstar Nursery California Floral Council Floral Trade Council Florida Flower Association
A–401–603 ($412.84)	731–TA–354	Stainless steel hollow products/ Sweden	AL Tech Specialty Steel Allegheny Ludlum Steel ARMCO Carpenter Technology Crucible Materials Damacus Tubular Products Specialty Tubing Group
A–508–604 ($376.92)	731–TA–366	Industrial phosphoric acid/Israel	Albright & Wilson FMC Hydrite Chemical Monsanto Stauffer Chemical
A–588–802 ($8,407.02)	731–TA389	3.5″ microdisks/ Japan	Verbatim
A–588–809 ($70,398.66)	731–TA–426	Small business telephone systems/Japan	American Telephone & Telegraph Comdial Eagle Telephonic
A–583–806 ($10,079.58)	731–TA–428	Small business telephone systems/Taiwan	American Telephone & Telegraph Comdial Eagle Telephonic
A–580–803 ($12,773.12)	731–TA–427	Small business telephone systems/Korea	American Telephone & Telegraph Comdial Eagle Telephonic
A–570–811 ($957.34)	731–TA–497	Tungsten ore concentrates/ China	Curtis Tungsten U.S. Tungsten

Commerce Case Number	*Commission Case Number*	*Product/Country*	*Petitioners/Supporters*
A–427–804 ($59,480.21)	731–TA–553	Hot-rolled lead & bismuth carbon steel products/France	Bethlehem Steel Inland Steel Industries USS/Kobe Steel
C–427–805 ($11,868.38)	701–TA–315	Hot-rolled lead & bismuth carbon steel products/France	Bethlehem Steel Inland Steel Industries USS/Kobe Steel

Dated: January 11, 2002.

DOUGLAS M. BROWNING,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, January 17, 2002 (67 FR 2511)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, January 16, 2002.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

DOUGLAS M. BROWNING,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF ELECTRICAL SIGNALING EQUIPMENT FOR MOTOR VEHICLES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of ruling letter and treatment relating to tariff classification of electrical signaling equipment for motor vehicles.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of the "Parking Assistant", and to revoke any treatment Customs has previously accorded to substantially identical transactions. This article is for use with motor vehicles and determines the distance between the device and a given object and emits an audible signal to alert the driver. Customs invites comments on the correctness of the proposed action.

DATE: Comments must be received on or before March 1, 2002.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927–0760.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility.** These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of the Parking Assistant. Although in this notice Customs is specifically referring to one ruling, *NY* F87653, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In *NY* F87653, dated June 21, 2000, the Parking Assistant for use with motor vehicles was held to be classifiable as other electric sound signaling apparatus, in subheading 8531.80.90, HTSUS. This ruling was based on the fact that the device emitted an audible beep to warn the driver as the vehicle came nearer an object. *NY* F87653 is set forth as "Attachment A" to this document.

It is now Customs position that because the Parking Assistant is believed to be principally used with motor vehicles, it is properly classified as electrical signaling equipment of a kind used for motor vehicles, in subheading 8512.30.00, HTSUS. Pursuant to 19 U.S.C. 1625(c)(1)), Customs intends to revoke *NY* F87653 and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis in *HQ* 965368, which is set forth as "Attachment B" to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment it previously accorded to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

Dated: January 10, 2002.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, June 21, 2000.
CLA-2-85:RR:NC:1:112 F87653
Category: Classification
Tariff No. 8531.80.9040

MR. ROBERT J. RESETAR
PORSCHE CARS NORTH AMERICA, INC.
980 Hammond Drive
Atlanta, GA 30328

Re: The tariff classification of a "Parking Assistant" from Germany.

DEAR MR. RESETAR:

In your letter dated May 18, 2000 you requested a tariff classification ruling.

As indicated by the submitted information and literature, the "Parking Assistant" is a device to assist the driver of a vehicle when backing into parking spaces. It consists of four parking assist sensors located on the rear bumper, and a control unit located under the driver's seat. The sensors emit and receive ultrasonic waves at regular intervals. These waves are transmitted back to the control unit, which triangulates the distance between the vehicle and an object behind it. An audible beep is emitted by the control unit and the signal increases as the vehicle gets closer to an object. It continues to increase in frequency until, at a certain point, the signal becomes continuous.

The applicable subheading for the "Parking Assistant" will be 8531.80.9040, Harmonized Tariff Schedule of the United States (HTS), which provides for other electric sound signaling apparatus. The rate of duty will be 1.3 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist David Curran at 212–637–7049.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 965368 JAS
Category: Classification
Tariff No. 8512.30.00

MR. ROBERT RESETAR
PORSCHE CARS NORTH AMERICA, INC.
980 Hammond Drive
Atlanta, GA 30328

Re: *NY* F87653 Revoked; Parking Assistant.

DEAR MR. RESETAR:

In *NY* F87653, which the Director of Customs National Commodity Specialist Division, New York, issued to you on June 21, 2000, the Parking Assistant, a device to assist drivers when backing vehicles into parking spaces, was found to be classifiable in subheading 8531.80.90, Harmonized Tariff Schedule of the United States (HTSUS), as other electric sound signaling apparatus. We have reconsidered this classification and now believe that it is incorrect.

Facts:

The Parking Assistant was described in *NY* F87653 as consisting of four sensors located on the rear bumper, and a control unit mounted under the driver's seat, the apparatus powered by the vehicle's electrical system. The sensors emit and receive ultrasonic waves at regular intervals. These waves are transmitted back to the control unit which triangulates the distance between the vehicle and an object behind it. The control unit emits an audible beep, presumably for the benefit of the driver, with the signal increasing to a continuous sound as the vehicle gets closer to an object. The actual distance from the object, however, is not displayed numerically.

The HTSUS provisions under consideration are as follows:

8512	Electrical lighting or signaling equipment (excluding articles of heading 8539), windshield wipers, defrosters and demisters, of a kind used for cycles or motor vehicles; parts thereof:
8512.30.00	Sound signaling equipment
* * * * * * *	
8531	Electric sound or visual signaling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530; parts thereof:
8531.80	Other apparatus:
8531.80.90	Other

Issue:

Whether the Parking Assistant is a good of heading 8512.

Law and Analysis:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings

and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. Though not dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. Customs believes the ENs should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

By its terms, heading 8531 excludes electric sound signaling apparatus of heading 8512. The qualifying language in heading 8512 "of a kind used for cycles or motor vehicles" denotes a provision governed by principal use, i.e., the use at or immediately prior to the date of importation of the goods of that class or kind to which an article belongs. The ENs on p. 1461 list horns, sirens and other electrical sound signaling appliances as being within the scope of heading 8512. It is reasonable and logical to conclude that the audible "beep" emitted by the control unit in the Parking Assistant qualifies as a type of sound signaling substantially similar to that produced by horns and sirens. Moreover, while a sample of the Parking Assistant is not currently available, our examination of substantially similar devices, their packaging and accompanying literature, leads us to conclude that the Parking Assistant belongs to a class or kind of sound signaling equipment principally used with motor vehicles. *See HQ* 964660 and *HQ* 964661, both dated January 4, 2001, motor vehicle alarm systems believed to be substantially similar to the Parking Assistant.

Holding:

Under the authority of GRI 1 the Parking Assistant is provided for in heading 8512. It is classifiable in subheading 8512.30.00, HTSUS. *NY* F87653, dated June 21, 2000, is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER RELATING TO ENTRY OF PILOT CARS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act (Pub.L. 103–182, 107 Stat. 2057) this notice advises interested parties that Customs intends to modify one ruling pertaining to the entry of pilot cars in the United States. Comments are invited on the correctness of the proposed modification.

DATE: Comments must be received on or before March 1, 2002.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Entry Procedures and Carriers Branch, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Glen E. Vereb, Entry Procedures and Carriers Branch, Office of Regulations and Rulings (202) 927–2320.

SUPPLEMENTAL INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify one ruling pertaining to the use of Canadian pilot cars in the United States. Customs invites comments on the correctness of the proposed modification.

Section 141.4, Customs Regulations (19 CFR 141.4), provides that entry as required by title 19, United States Code, section 1484(a) (19 U.S.C. 1484(a)), shall be made of every importation whether free or dutiable and regardless of value, except for intangibles and articles specifically exempted by law or regulation from the requirements for entry.

In Headquarters ruling letter (HRL) 114914, dated January 12, 2000, Customs held that Canadian pilot cars escorting Canadian trucks carrying wide loads from Canada to points in the United States and subsequently returning to Canada after the load is delivered are not exempt from formal entry. HRL 114914 is set forth as Attachment A to this document.

Upon further review of HRL 114914, we have concluded that such pilot cars can be entered informally pursuant to sections 148.23(c) and 143.23(a), Customs Regulations (19 CFR 148.23 and 143.23(a)). Customs does retain the right to demand formal entry of these pilot cars pursuant to section 143.22, Customs Regulations (19 CFR 143.22) if, in the discretion of the port director, formal entry is warranted.

Therefore, Customs intends to modify HRL 114914 so that Canadian pilot cars may be entered informally subject to the discretion of the port director to demand a formal entry. Proposed HRL 115532 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: January 11, 2002.

LARRY L. BURTON,
Chief,
Entry Procedures and Carriers Branch.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 12, 2000.
BOR–4–04–RR:IT:EC 114914 GEV
Category: Carriers

PAUL R. LANDRY
PRESIDENT
BRITISH COLUMBIA TRUCKING ASSOCIATION
#1–1610 Krebet Way
Port Coquitlam, British Columbia, Canada V3C 5W9

Re: Instruments of International Traffic; Pilot Cars; 19 U.S.C. § 1322.

DEAR MR. LANDRY:

This is in response to your letter dated December 20, 1999, seeking clarification regarding the treatment by the U.S. Customs Service of Canadian pilot cars. Our ruling on this matter is set forth below.

Facts:

Canadian pilot cars are required by law to escort Canadian-based trucks carrying wide loads from Canada to points in the United States. The pilot cars subsequently return to Canada after the load is delivered.

Issue:

Whether Canadian pilot cars are exempt from formal entry.

Laws and Analysis:

Section 141.4, Customs Regulations (19 CFR § 141.4), provides that entry as required by title 19, United States Code, § 1484(a) (19 U.S.C. § 1484(a)), shall be made of every importation whether free or dutiable and regardless of value, except for intangibles and articles specifically exempted by law or regulations from the requirements for entry. Since Canadian pilot cars are not so exempted, they are subject to entry and payment of any applicable duty. With respect to the latter, we note that such vehicles are exempt from duty pursuant to Chapter 87, Harmonized Tariff Schedule of the United States, Annotated (HTSUSA).

Vehicles and other instruments of international traffic may be entered without entry and payment of duty under the provisions of 19 U.S.C. § 1322. To qualify as instruments of international traffic, trucks having their principal base of operations in a foreign country must be arriving in the United States with merchandise destined for points in the United States, or arriving empty or loaded for the purpose of taking merchandise out of the United States (see 19 CFR § 123.14(a)).

Section 10.41(d), Customs Regulations (19 CFR § 10.41(d)), provides, in part, that any foreign-owned vehicle brought into the United States as an element of a commercial transaction, except as provided at § 123.14(c) (pertaining to the use of foreign-based vehicles in local traffic in the United States), is subject to treatment as an importation of merchandise from a foreign country and a regular entry therefor shall be made.

Pursuant to a request for internal advice received from the former Regional Commissioner of Customs, Pacific Region, dated January 29, 1975, regarding this matter, Headquarters issued a response dated April 1, 1975 (file no. 101502), which provided that "* * * pilot cars do not qualify for admission under this provision [19 CFR § 123.14] because they do not carry merchandise or passengers between the United States and Canada. Admission of foreign-owned pilot cars as instruments of international traffic is not warranted and should no [sic] longer be permitted."

With respect to the applicability of § 10.41(d) to the use of Canadian pilot cars as described above, the aforementioned internal advice further provided that whether an article is used as "an element of a commercial transaction" depends upon the circumstances of each case, and the term thus is not susceptible of authoritative definition. Generally the courts have defined a commercial activity, in its broadest sense, to include any type of business or activity which is carried on for a profit. *Caribbean Steamship Co. v. Le Societe Navale Caennaise*, 140 FSupp. 16, 21 (1966). The internal advice held that the use of Canadian pilot cars as described above is "an element of a commercial transaction" within the meaning of that regulatory provision.

Advice furnished by Headquarters in response to a request therefor represents the official position of the U.S. Customs Service with respect to the application of the Customs laws to the facts of a specific transaction and, absent a request for reconsideration by the requesting field office, is to be applied by the field office in its disposition of the Customs transaction in question. (19 CFR § 177.11(b)(6)) To date, Headquarters has received no such request for reconsideration.

Accordingly, Customs position regarding the treatment of Canadian pilot cars as set forth in the above-cited internal advice remains unchanged. Such vehicles are subject to formal entry.

Holding:

Canadian pilot cars are not exempt from formal entry.

JERRY LADERBERG,
Chief,
Entry Procedures and Carriers Branch.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

BOR–4–04–RR:IT:EC 115532 GEV
Category: Carriers

PAUL R. LANDRY
PRESIDENT
BRITISH COLUMBIA TRUCKING ASSOCIATION
#1–1610 Krebet Way
Port Coquitlam, British Columbia, Canada V3C 5W9

Re: Pilot Cars; Entry; 19 U.S.C. 1498.

DEAR MR. LANDRY:

This is in response to your letter dated December 20, 1999, seeking clarification regarding the treatment by the U.S. Customs Service of Canadian pilot cars. Our ruling on this matter is set forth below.

Facts:

Canadian pilot cars are required by law to escort Canadian-based trucks carrying wide loads from Canada to points in the United States. The pilot cars subsequently return to Canada after the load is delivered.

Issue:

Whether Canadian pilot cars are exempt from entry.

Laws and Analysis:

Section 141.4, Customs Regulations (19 CFR 141.4), provides that entry as required by title 19, United States Code, 1484(a) (19 U.S.C. 1484(a)), shall be made of every importation whether free or dutiable and regardless of value, except for intangibles and articles specifically exempted by law or regulations from the requirements for entry. Since Canadian pilot cars are not so exempted, they are subject to entry and payment of any applicable duty. In regard to entry, this may be done informally pursuant to sections 148.23(c) and 143.23(a), Customs Regulations (19 CFR 148.23(c) and 143.23(a)). However, Customs does retain the right to demand formally entry pursuant to section 143.22, Customs Regulations (19 CFR 143.22) if, in the discretion of the port director, formal entry is warranted. With respect to duty assessment, we note that such vehicles are exempt from duty pursuant to Chapter 87, Harmonized Tariff Schedule of the United States, Annotated (HTSUSA).

Vehicles and other instruments of international traffic may be entered without entry and payment of duty under the provisions of 19 U.S.C. 1322. To qualify as instruments of

international traffic, trucks having their principal base of operations in a foreign country must be arriving in the United States with merchandise destined for points in the United States, or arriving empty or loaded for the purpose of taking merchandise out of the United States (see 19 CFR 123.14(a)).

Section 10.41(d), Customs Regulations (19 CFR 10.41(d)), provides, in part, that any foreign-owned vehicle brought into the United States as an element of a commercial transaction, except as provided at section 123.14(c) (pertaining to the use of foreign-based vehicles in local traffic in the United States), is subject to treatment as an importation of merchandise from a foreign country and a regular entry therefor shall be made.

Pursuant to a request for internal advice received from the former Regional Commissioner of Customs, Pacific Region, dated January 29, 1975, regarding this matter, Headquarters issued a response dated April 1, 1975 (file no. 101502), which provided that "* * * pilot cars do not qualify for admission under this provision [19 CFR 123.14] because they do not carry merchandise or passengers between the United States and Canada. Admission of foreign-owned pilot cars as instruments of international traffic is not warranted and should not [sic] longer be permitted."

With respect to the applicability of section 10.41(d) to the use of Canadian pilot cars as described above, the aforementioned internal advice further provided that whether an article is used as "an element of a commercial transaction" depends upon the circumstances of each case, and the term thus is not susceptible of authoritative definition. Generally the courts have defined a commercial activity, in its broadest sense, to include any type of business or activity which is carried on for a profit. *Caribbean Steamship Co. v. Le Societe Navale Caennaise*, 140 FSupp. 16, 21 (1966). The internal advice held that the use of Canadian pilot cars as described above is "an element of a commercial transaction" within the meaning of that regulatory provision.

Advice furnished by Headquarters in response to a request therefor represents the official position of the U.S. Customs Service with respect to the application of the Customs laws to the facts of a specific transaction and, absent a request for reconsideration by the requesting field office, is to be applied by the field office in its disposition of the Customs transaction in question. (19 CFR 177.11(b)(6)) To date, Headquarters has received no such request for reconsideration.

Accordingly, Customs position regarding the treatment of Canadian pilot cars as set forth in the above-cited internal advice remains unchanged. Such vehicles are subject to entry which may done informally pursuant to the above-cited regulatory authority.

Holding:

Canadian pilot cars are not exempt from entry, however, this may be done informally pursuant to 19 CFR 148.23(c) and 143.23(a)). However, Customs does retain the right to demand formally entry pursuant to 19 CFR 143.22.

LARRY L. BURTON,
Chief,
Entry Procedures and Carriers Branch.

REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF BUOYANCY COMPENSATORS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letters and treatment relating to tariff classification of buoyancy compensators.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking two ruling letters pertaining to the tariff classification of buoyancy compensators under the Harmonized Tariff Schedule of the United States (HTSUS). Customs is also revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed actions was published on December 12, 2001, in Volume 35, Number 28, of the CUSTOMS BULLETIN. No comments were received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 1, 2002.

FOR FURTHER INFORMATION CONTACT: Joe Shankle, Textiles Branch, (202) 927–2379.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts that emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, notice proposing to revoke New York Ruling letters (NY) E82612, dated June 14, 2000, and NY F83415,

dated March 22, 2000, and to revoke any treatment accorded to substantially identical merchandise was published in the December 12, 2001, CUSTOMS BULLETIN, Volume 35, Number 50. No comments were received in response to the notice.

As stated in the proposed notice, this revocation will cover any rulings on the subject merchandise which may exist but which have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions that is contrary to the position set forth in this notice. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this final decision.

In NY E82612, Customs classified a buoyancy compensator jacket under subheading 6210.50.5055, HTSUSA, which provides in pertinent part, for "Garments, made up of fabrics of heading 5602, 5603, 5903, 5906 or 5907: Other women's or girls' garments: Of man-made fibers: Other * * * Other." The buoyancy compensator was described as a jacket composed of a shell of woven 100% nylon coated on the inside with polyurethane. The buoyancy compensator was designed for diving, having an inflatable bladder, woven polypropylene straps, a buoyancy compensator hose retainer, a rear adjustable buckle, strap and harness for air tanks, and a padded inner back for comfort.

In NY F83415, dated March 22, 2000, Customs classified five buoyancy compensator jackets under subheading 6211.43.0091, HTSUSA, which provides, in pertinent part, for "Track suits, ski-suits and swimwear; other garments: Other garments, women's or girls: Of man-made fibers, Other." The buoyancy compensators were described as jackets used during underwater diving. All of the jackets were made of a woven 100% nylon fabric. All had features such as a carry handle, stainless steel rings, inflatable/deflatable bladders, weight pockets with dump ability, accessory clips, adjustable arms, chest and waist straps, hose retainer, storage pockets, utility rings and padded backs.

It is now Customs position that buoyancy compensators of the type discussed herein, are classifiable under subheading 9506.29.0040, HTSUSA, which provides for "Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Water skis, surf boards, sailboards and other water-sport equipment; parts and accessories thereof: Other, Other."

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY E82612, NY F83415, and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letters (HQ) 965312 and HQ 965313 (Attachments A and B respectively). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions that is contrary to the position set forth in this notice.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: January 14, 2002.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 14, 2002.

CLA–2 RR:CR:TE 965312 JFS
Category: Classification
Tariff No. 9506.29.0040

MR. OR MRS. J. WOOLLEY
TABATA USA, INC.
2380 Mira Mar Ave.
Long Beach, CA 90815

Re: Revocation of NY E82612, dated June 14, 1999; Classification of Buoyancy Compensator Jacket; Dive Equipment; Chapter 95; Not Wearing Apparel.

DEAR MR. OR MRS. WOOLLEY:

This letter is to inform you that Customs has reconsidered New York Ruling Letter (NY) E82612, issued to you on June 14, 1999, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of a buoyancy compensator. After review of that ruling, it has been determined that the classification the buoyancy compensator in subheading 6210.50.5055, HTSUSA, was incorrect. For the reasons that follow, this ruling revokes NY E82612.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agree-

ment Implementation Act (Pub. L. 103–82, 107 Stat. 2057, 2186), notice of the proposed revocation of NY E2612 was published on December 12, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 50. As explained in the notice, the period within which to submit comments on this proposal was until January 11, 2002. No comments were received in response to this notice.

Facts:

The item that is the subject of this revocation is known as a buoyancy compensator. It was classified in subheading 6210.50.5055, HTSUSA, which provides, in pertinent part, for "Garments, made up of fabrics of heading 5602, 5603, 5903, 5906 or 5907: Other women's or girls' garments: Of man-made fibers: Other * * * Other." The buoyancy compensator was described in NY E82612 as follows:

> The submitted sample is a B.C. Jacket (buoyancy compensator jacket) which is composed of a shell of woven 100% nylon fabric coated inside with polyurethane. The jacket is used for scuba diving and features woven polypropylene straps, a buoyancy compensator hose retainer, a rear adjustable buckle, strap and harness for air tanks, and a padded inner back for comfort. The jacket's buoyancy compensator is adjustable and can be easily inflated and deflated. There is a wide adjustable cummerbund with hook and loop closure, an adjustable shoulder buckle with a quick-release feature, and two flap side pockets with hook and loop closure.

Issue:

Is the buoyancy compensator classifiable as dive equipment under subheading 9506.29.0040, HTSUSA?

Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

Chapter 62 covers articles of apparel that are not knitted or crocheted. In order to classify the buoyancy compensator in Chapter 62, HTSUSA, it must be considered wearing apparel. Buoyancy compensators are designed to be worn and, therefore, fall generally within the class or kind of articles considered wearing apparel. See *Arnold v. United States*, 147 U.S. 494, 496 (1892). See also HQ 952204, dated April 12, 1993. However, all things worn by humans are not necessarily wearing apparel. See *Dynamics Classics, Ltd. v. United States*, Slip. Op. 86–105, 10 C.I.T. 666 (Oct. 17, 1986) (plastic suits used for weight reduction inappropriate for wear during exercise or work not wearing apparel); *Antonio Pompeo v. United States*, 40 Cust. Ct. 362, C.D. 2006 (1958) (crash helmets not wearing apparel); *Best v. United States*, 1 Ct. Cust. Appls. 49, T.D. 31009 (1910) (ear caps for prevention of abnormal ear growth not wearing apparel). "*Admiral Craft Equipment* developed the standard that items are not considered wearing apparel when the use of those items goes 'far beyond that of general wearing apparel.'[1] *Daw Industries, Inc. v. United States*, 714 F.2d 1140, 1143 (Fed. Cir. 1983). In *Daw Industries* the Court found that sheaths and socks used exclusively with prostheses do not provide "significantly more, or essentially different," protection than analogous articles of clothing, but merely "differ incrementally." The Court concluded that while in some cases the differences may become so large that the article is no longer wearing apparel, that was not the case with the sheaths and socks.

In HQ 952204, dated April 12, 1993, Customs applied the reasoning relied upon in *Daw Industries* when considering the classification of a "swim sweater" which is a flotation device that functions as a swimming aid for children. Customs found that while the "swim sweater" provides some protection from the elements and arguably adorns the body, it is used in very specific situations. Customs concluded that the increment in the difference in use and effect between the "swim sweater" and a conventional sweater is so large that the "swim sweater" is no longer wearing apparel. For additional rulings finding that "swim sweaters" are not wearing apparel, see HQ 952483, dated May 27, 1993; HQ 95590, dated January 31, 1994; HQ 953775, dated April 12, 1993; and HQ 953776, dated April 12, 1993.

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[1] *Admiral Craft Equipment, Corp. v. United States*, 82 Cust. Ct. 162, C.D. 4796 (1979).

The use of a buoyancy compensator like the one discussed herein, whether in the form of a vest or a jacket, goes far beyond that of a typical jacket or vest. Buoyancy compensators are designed to provide SCUBA divers with neutral buoyancy.[2] "Divers usually seek a condition of neutral to slightly negative buoyancy. * * * Neutral buoyancy enhances a scuba diver's ability to swim easily, change depth, and hover."[3] U.S. Navy Diving Manual, 2–9.4.2, p. 2–14. In order to maintain neutral buoyancy, divers use a combination of inflatable air bladders contained within the buoyancy compensator and weights.

In HQ 950562, dated January 9, 1992, Customs classified a Stratus snorkeling vest designed to provide surface flotation as well as warmth as a garment. This ruling was affirmed in HQ 952483, dated May 27, 1993. The vest was constructed by bonding a flotation pocket to a neoprene vest. Relying on the EN to Heading 6113, HTS (heading includes oilskins & divers' suits), Customs reasoned that if the neoprene vest were imported without the flotation pocket, it would be classified as a garment. Customs next considered, in light of *Daw Industries*, supra, whether the additional protection and other advantages afforded by the flotation pocket were "significantly more, or essentially different," than those provided by the neoprene vest alone. Because marketing materials stated that the vest was "designed to provide warmth and a small amount of flotation," Customs concluded that the snorkeling vest did not differ significantly from a neoprene vest alone, and affirmed HQ 950562.

Whereas the snorkel vest had dual functions of providing warmth and buoyancy, the entire design of buoyancy compensators is centered around buoyancy control. While features such as padding provide some warmth and protection, these benefits are ancillary to the function of allowing the diver to control her buoyancy. The instant buoyancy compensator is not a garment or wearing apparel.

Customs has classified some articles with similar features to the instant buoyancy compensator in Chapter 63 as lifejackets or lifebelts. In HQ 952204 (classifying the swim sweaters discussed above), Customs relied upon the following definitions of lifejackets and lifebelts:

> Webster's New World Dictionary, Third College Edition (1988) defines a life preserver as a "buoyant device for saving a person from drowning by keeping the body afloat, as a ring or sleeveless jacket of canvas-covered cork or kapok." Buoyancy is defined as "the ability or tendency to float or rise in liquid or air." A life belt is defined as "a life preserver in the form of a belt," and a life jacket (or vest) as "a life preserver in the form of a sleeveless jacket or vest."

Customs noted that the swim sweaters did not meet U.S. Coast Guard specifications for lifepreservers. However, because they meet the common definition of a lifepreserver, they were classifiable as such.

Likewise, in HQ 950496, dated March 5, 1992, Customs classified a windsurfer's buoyancy vest within subheading 6307.20, HTSUSA, as a lifejacket, even though it did not meet the U.S. Coast Guard specifications for life preservers. See also HQ 952930, dated February 25, 1993. The basis of this ruling was that while the article did not meet U.S. Coast Guard specifications, its main purpose was to help keep the wearer afloat. See also NY G87464, dated March 13, 2001 (classifying a bib-like snorkel vest as a lifejacket under subheading 6307.20, HSUSA).[4]

In contrast, the primary function of a buoyancy compensator is to control buoyancy, be it negative buoyancy or positive buoyancy, at all stages of a dive. While a buoyancy compensator can be, and is, used to help divers float on the surface, this is merely one end of the spectrum of its capabilities. At the other end of the spectrum, divers can deflate the buoyancy compensator allowing them to descend to their desired depth, at which point the buoyancy compensator can be inflated as needed to maintain neutral buoyancy. The inflatable bladder, inflation tube with mouthpiece, exhaust valve and weight pouches makes this vest an adjustable apparatus that acts to increase or decrease buoyancy to counteract the weight of the air tank or the buoyancy of a wet suit.

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[2] The acronym SCUBA stands for "Self Contained Underwater Breathing Apparatus." U.S. Navy Diving Manual, Appx. 1D–9.

[3] Negative buoyancy gives a diver in a helmet and dress (Navy term for apparel and gear) a better foothold on the bottom. U.S. Navy Diving Manual, 2–9.4.2, p. 2–14.

[4] Unlike the snorkel vest in HQ 950562, this snorkel vest only consisted of the flotation bib and did not have a neoprene vest to add warmth and protection.

Subheading 9506.29.00.40, HTSUSA, provides for:

> Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Water skis, surf boards, sailboards and other water-sport equipment; parts and accessories thereof: Other, Other.

The EN to heading 9506, HTSUSA, state:

This heading covers:

* * * * * * *

(B) Requisites for other sports and outdoor games * * *, e.g.:

* * * * * * *

(2) Water-skis, surf-boards, sailboards and other water-sports equipment, such as diving stages (platforms), chutes, divers' flippers and respiratory masks of a kind used without oxygen or compressed air bottles, and simple underwater breathing tubes (generally known as "snorkels") for swimmers or divers.

The legal note to Chapter 95 excludes sports clothing of chapters 61 and 62. However, this exclusionary note does not operate to exclude buoyancy compensators from Chapter 95 because, as discussed above, buoyancy compensators are not clothing.

It is well settled that equipment used for scuba diving is classified in subheading 9506.29.0040, HTSUSA. See, *H.I.M./Fathom, Inc., v. United States*, 21 C.I.T. 776, 981 F. Supp. 610 (classifying a weight belt used for diving in subheading 9506.29.0040, HTSUSA (1997)); NY 81357, dated August 23, 1995, and NY G86744, dated February 12, 2001, (classifying weight belts as diving equipment). The instant buoyancy compensator that is equipped with an air bladder, inflation hose, exhaust valve, weight pouches and compressed air tank harness, is clearly a piece of equipment designed for scuba diving. Accordingly, it is classified as dive equipment under subheading 9506.29.0040, HTSUSA. For similar rulings on buoyancy compensators, see HQ 965106 and HQ 965313.

Holding:

The instant buoyancy compensator is classified under subheading 9506.29.0040, HTSUSA, which provides for "Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Water skis, surf boards, sailboards and other water-sport equipment; parts and accessories thereof: Other, Other." The duty rate is FREE.

Effect On Other Rulings:

NY E82612, dated June 14, 1999, is hereby REVOKED. In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 14, 2002.

CLA-2 RR:CR:TE 965313 JFS
Category: Classification
Tariff No. 9506.29.0040

MR. TOM PACIAFFI
CORONET BROKERS CORP.
P.O. Box 300764
Cargo Building 80
John F. Kennedy International Airport
Jamaica, NY 11430-0764

Re: Revocation of NY F83415, dated March 22, 2000; Classification of Buoyancy Compensator Vests; Dive Equipment; Chapter 95; Not Wearing Apparel.

DEAR MR. PACIAFFI:

This letter is to inform you that Customs has reconsidered New York Ruling Letter (NY) F83415, issued to you on behalf of your client Cressi Sub USA, on March 22, 2000, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of five buoyancy compensators. After review of that ruling, it has been determined that the classification the buoyancy compensators in subheading 6211.43.0091, HTSUSA, was incorrect. For the reasons that follow, this ruling revokes NY F83415.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-82, 107 Stat. 2057, 2186), notice of the proposed revocation of NY F83415 was published on December 12, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 50. As explained in the notice, the period within which to submit comments on this proposal was until January 11, 2002. No comments were received in response to this notice.

Facts:

The items that are the subject of this revocation are known as buoyancy compensators. In NY F83415, they were classified in subheading 6211.43.0091, HTSUSA, which provides, in pertinent part, for "Track suits, ski-suits and swimwear; other garments: Other garments, women's or girls': Of man-made fibers, Other." The buoyancy compensators were described as follows:

> The items are Styles Air, Safety 108, Safety 104, Safety 102, Aquapro 6 and Aquapro 5 Buoyancy Compensator Jackets. The jackets are used during underwater diving. All jackets are made of a woven 100% nylon fabric. Although the styles vary, they feature such items as a carry handle, stainless steel rings, inflatable/deflatable bladders, weight pockets with dump ability, accessory clips, adjustable arm, chest and waist straps, hose retainer, storage pockets, utility rings and padded backs.

Issue:

Are the buoyancy compensators classifiable as dive equipment under subheading 9506.29.0040, HTSUSA?

Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

Chapter 62 covers articles of apparel that are not knitted or crocheted. In order to classify the buoyancy compensator in Chapter 62, HTSUSA, it must be considered wearing apparel. Buoyancy compensators are designed to be worn and, therefore, fall generally within the class or kind of articles considered wearing apparel. See *Arnold v. United States*, 147 U.S. 494, 496 (1892). See also HQ 952204, dated April 12, 1993. However, all

things worn by humans are not necessarily wearing apparel. See *Dynamics Classics, Ltd. v. United States*, Slip. Op. 86–105, 10 C.I.T. 666 (Oct. 17, 1986) (plastic suits used for weight reduction inappropriate for wear during exercise or work not wearing apparel); *Antonio Pompeo v. United States*, 40 Cust. Ct. 362, C.D. 2006 (1958) (crash helmets not wearing apparel); *Best v. United States*, 1 Ct. Cust. Appls. 49, T.D. 31009 (1910) (ear caps for prevention of abnormal ear growth not wearing apparel). "*Admiral Craft Equipment* developed the standard that items are not considered wearing apparel when the use of those items goes 'far beyond that of general wearing apparel.'[1] *Daw Industries, Inc. v. United States*, 714 F.2d 1140, 1143 (Fed. Cir. 1983). In *Daw Industries* the Court found that sheaths and socks used exclusively with prostheses do not provide "significantly more, or essentially different," protection than analogous articles of clothing, but merely "differ incrementally." The Court concluded that while in some cases the differences may become so large that the article is no longer wearing apparel, that was not the case with the sheaths and socks.

In HQ 952204, dated April 12, 1993, Customs applied the reasoning relied upon in *Daw Industries* when considering the classification of a "swim sweater" which is a flotation device that functions as a swimming aid for children. Customs found that while the "swim sweater" provides some protection from the elements and arguably adorns the body, it is used in very specific situations. Customs concluded that the increment in the difference in use and effect between the "swim sweater" and a conventional sweater is so large that the "swim sweater" is no longer wearing apparel. For additional rulings finding that "swim sweaters" are not wearing apparel, see HQ 952483, dated May 27, 1993; HQ 95590, dated January 31, 1994; HQ 953775, dated April 12, 1993; and HQ 953776, dated April 12, 1993.

The use of buoyancy compensators like the ones discussed herein, whether in the form of a vest or a jacket, goes far beyond that of a typical jacket or vest. Buoyancy compensators are designed to provide SCUBA divers with neutral buoyancy.[2] "Divers usually seek a condition of neutral to slightly negative buoyancy. * * * Neutral buoyancy enhances a scuba diver's ability to swim easily, change depth, and hover."[3] U.S. Navy Diving Manual, 2–9.4.2, p. 2–14. In order to maintain neutral buoyancy, divers use a combination of inflatable air bladders contained within the buoyancy compensator and weights.

In HQ 950562, dated January 9, 1992, Customs classified a Stratus snorkeling vest designed to provide surface flotation as well as warmth as a garment. This ruling was affirmed in HQ 952483, dated May 27, 1993. The vest was constructed by bonding a flotation pocket to a neoprene vest. Relying on the EN to Heading 6113, HTS (heading includes oilskins & divers' suits), Customs reasoned that if the neoprene vest were imported without the flotation pocket, it would be classified as a garment. Customs next considered, in light of *Daw Industries*, supra, whether the additional protection and other advantages afforded by the flotation pocket were "significantly more, or essentially different," than those provided by the neoprene vest alone. Because marketing materials stated that the vest was "designed to provide warmth and a small amount of flotation," Customs concluded that the snorkeling vest did not differ significantly from a neoprene vest alone, and affirmed HQ 950562.

Whereas the snorkel vest had dual functions of providing warmth and buoyancy, the entire design of buoyancy compensators is centered around buoyancy control. While features such as padding provide some warmth and protection, these benefits are ancillary to the function of allowing the diver to control her buoyancy. The instant buoyancy compensators are not garments or wearing apparel.

Customs has classified some articles with similar features to the instant buoyancy compensators in Chapter 63 as lifejackets or lifebelts. In HQ 952204 (classifying the swim sweaters discussed above), Customs relied upon the following definitions of lifejackets and lifebelts:

> Webster's New World Dictionary, Third College Edition (1988) defines a life preserver as a "buoyant device for saving a person from drowning by keeping the body afloat, as a ring or sleeveless jacket of canvas-covered cork or kapok." Buoyancy is defined as "the ability or tendency to float or rise in liquid or air." A life belt is defined as

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[1] *Admiral Craft Equipment, Corp. v. United States*, 82 Cust. Ct. 162, C.D. 4796 (1979).

[2] The acronym SCUBA stands for "Self Contained Underwater Breathing Apparatus." U.S. Navy Diving Manual, Appx. 1D–9.

[3] Negative buoyancy gives a diver in a helmet and dress (Navy term for apparel and gear) a better foothold on the bottom. U.S. Navy Diving Manual, 2–9.4.2, p. 2–14.

"a life preserver in the form of a belt," and a life jacket (or vest) as "a life preserver in the form of a sleeveless jacket or vest."

Customs noted that the swim sweaters did not meet U.S. Coast Guard specifications for lifepreservers. However, because they meet the common definition of a lifepreserver, they were classifiable as such.

Likewise, in HQ 950496, dated March 5, 1992, Customs classified a windsurfer's buoyancy vest within subheading 6307.20, HTSUSA, as a lifejacket, even though it did not meet the U.S. Coast Guard specifications for life preservers. See also HQ 952930, dated February 25, 1993. The basis of this ruling was that while the article did not meet U.S. Coast Guard specifications, its main purpose was to help keep the wearer afloat. See also NY G87464, dated March 13, 2001 (classifying a bib-like snorkel vest as a lifejacket under subheading 6307.20, HSUSA).[4]

In contrast, the primary function of a buoyancy compensator is to control buoyancy, be it negative buoyancy or positive buoyancy, at all stages of a dive. While a buoyancy compensator can be, and is, used to help divers float on the surface, this is merely one end of the spectrum of its capabilities. At the other end of the spectrum, divers can deflate the buoyancy compensator allowing them to descend to their desired depth, at which point the buoyancy compensator can be inflated as needed to maintain neutral buoyancy. The inflatable bladder, inflation tube with mouthpiece, exhaust valve and weight pouches makes this vest an adjustable apparatus that acts to increase or decrease buoyancy to counteract the weight of the air tank or the buoyancy of a wet suit.

Subheading 9506.29.00.40, HTSUSA, provides for:

> Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Water skis, surf boards, sailboards and other water-sport equipment; parts and accessories thereof: Other, Other.

The EN to heading 9506, HTSUSA, state:

> This heading covers:
>
> * * * * * * *
>
> (B) Requisites for other sports and outdoor games * * *, e.g.:
>
> * * * * * * *
>
> (2) Water-skis, surf-boards, sailboards and other water-sports equipment, such as diving stages (platforms), chutes, divers' flippers and respiratory masks of a kind used without oxygen or compressed air bottles, and simple underwater breathing tubes (generally known as "snorkels") for swimmers or divers.

The legal note to Chapter 95 excludes sports clothing of chapters 61 and 62. However, this exclusionary note does not operate to exclude buoyancy compensators from Chapter 95 because, as discussed above, buoyancy compensators are not clothing.

It is well settled that equipment used for scuba diving is classified in subheading 9506.29.0040, HTSUSA. See, *H.I.M./Fathom, Inc., v. United States*, 21 C.I.T. 776, 981 F. Supp. 610 (classifying a weight belt used for diving in subheading 9506.29.0040, HTSUSA (1997)); NY 81357, dated August 23, 1995, and NY G86744, dated February 12, 2001, (classifying weight belts as diving equipment). The instant buoyancy compensators that are equipped with an air bladder, inflation hose, exhaust valve, weight pouches and compressed air tank harness, are clearly pieces of equipment designed for scuba diving. Accordingly, they are classified as dive equipment under subheading 9506.29.0040, HTSUSA. For similar rulings on buoyancy compensators, see HQ 965106 and HQ 965312.

Holding:

The Safety 108, Safety 104, Safety 102, Aquapro 6 and Aquapro 5 buoyancy compensators are classified under subheading 9506.29.0040, HTSUSA, which provides for "Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof: Water skis, surf boards, sailboards and other water-sport equipment; parts and accessories thereof: Other, Other." The duty rate is FREE.

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[4] Unlike the snorkel vest in HQ 950562, this snorkel vest only consisted of the flotation bib and did not have a neoprene vest to add warmth and protection.

Effect On Other Rulings:

NY F83415, dated March 22, 2000, is hereby REVOKED. In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN TIME DELAY RELAY MODULES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter and the revocation of treatment relating to the classification of certain time delay relay modules.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling, and is revoking any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of certain time delay relay modules under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed revocation was published on December 12, 2001, in Vol. 35, No. 50 of the CUSTOMS BULLETIN. No comments were received.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 1, 2002.

FOR FURTHER INFORMATION CONTACT: Andrew M. Langreich, General Classification Branch: (202) 927–2318.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts, which emerge from the law, are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public

with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, notice proposing to revoke NY F89832, dated August 15, 2000, was published on December 12, 2001, in Vol. 35, No. 50 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

As stated in the proposed notice, this revocation action will cover any rulings on this merchandise that may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. § 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice, may raise the rebuttable presumption of lack of reasonable care on the part of the importers or their agents for importations of merchandise subsequent to the effective date of this final decision.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking NY F89832, and any other ruling not specifically identified, to reflect the proper classification of the time delay relay modules under subheading 8536.41.00, HTSUS, which provides for other electrical relays for a voltage not exceeding 60V, pursuant to the analysis in HQ 964754, which is set forth as the Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

Dated: January 15, 2002.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 15, 2002.

CLA–2 RR:CR:GC 964754 AML
Category: Classification
Tariff No. 8536.41.00

MS. JULIE S. JOHNSON
IMPORT COMPLIANCE SPECIALIST
HONEYWELL H&BC
1985 Douglas Drive North
Golden Valley, MN 55422

Re: Reconsideration of NY F89832; Time delay relay module.

DEAR MS. JOHNSON:

This is in reference to your letter, dated November 28, 2000, to the National Commodity Specialist Division, New York, requesting reconsideration of New York Ruling Letter (NY) F89832, issued to you on August 15, 2000, which concerned the classification of a time delay relay module (model # ST82U) under the Harmonized Tariff Schedule of the United States (HTSUS). Your request was forwarded to this office for reply. NY F89832 classified the time delay relay module (model # ST82U) under subheading 8536.49.0080, HTSUS, which provides for other electrical delays. Descriptive literature was forwarded for our consideration. We have reviewed NY F89832 and believe that the classification set forth is incorrect.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published on December 12, 2001, in Vol. 35, No. 50 of the CUSTOMS BULLETIN, proposing to revoke NY F89832 and to revoke the treatment pertaining to the time delay relay module. No comments were received in response to this notice.

Facts:

The article was described in NY F89832 as follows:

> As indicated by the submitted descriptive literature, the relay, identified as the ST82U family, is described as operating on a time delay principle. It contains a time delay circuit that enables the relay to function at a specified time period.

In your November 28, 2000, letter, you state that the descriptive information and prints provided with your original ruling request indicate that the voltage of the time delay relay family is 24 volts. NY F89832 classified the time delay relay module (model # ST82U) under subheading 8536.49.0080, HTSUS, which provides for other electrical delays, with the term "other" referring to articles with voltages exceeding 60V but not exceeding 1000V.

Literature provided with your request describes the function of the articles as follows:

> The ST82 time delay relay is used in compressor-run air conditioning and heat pump systems. The ST82 delays the indoor blower shut-off after the compressor has shut off.

Issue:

Whether the "family" of time delay relay modules, model # ST82U (including model # ST82U1004) is classifiable under subheading 8536.41.00, HTSUS, which provides for other electrical relays for a voltage not exceeding 60V?

Law and Analysis:

The General Rules of Interpretation (GRIs) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states in pertinent part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes[.]"

The HTSUS provisions under consideration are as follows:

8536	Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders, junction boxes), for a voltage not exceeding 1,000 V:
	Relays:
8536.41.00	For a voltage not exceeding 60 V:
8536.49.00	Other.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. Customs believes the ENs should always be consulted. See T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The ENs to Chapter 85 provide, in pertinent part, that the chapter covers "certain electrical goods not generally used independently, but designed to play a particular role as components, in electrical equipment, e.g., capacitors (heading 85.32), switches, fuses, junction boxes, etc. (heading 85.35 or 85.36)." The ENs to heading 8536 provide, in pertinent part, as follows:

> These apparatus consist essentially of devices for making or breaking one or more circuits in which they are connected, or for switching from one circuit to another; they may be known as single pole, double pole, triple pole, etc., according to the number of switch circuits incorporated. This group also includes change-over switches and relays.
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> * * * * * * *
>
> (C) Relays are electrical devices by means of which the circuit is automatically controlled by a change in the same or another circuit. They are used, for example, in telecommunication apparatus, road or rail signalling apparatus, for the control or protection of machine-tools, etc.
>
> The various types can be distinguished by, for example:
>
> * * * * * * *
>
> (2) The predetermined conditions on which they operate: maximum current relays, maximum or minimum voltage relays, differential relays, fast acting cut-out relays, time delay relays, etc.

The time delay relay modules are classifiable at GRI 1 under heading 8536, HTSUS. The evidence presented in the letter requesting reconsideration, corroborated by the descriptive literature, demonstrates that "the voltage of this time delay relay family is 24 volts." Such articles with voltages not exceeding 60V are classifiable under subheading 8536.41.00, HTSUS. The time delay relay modules will be so classified.

Holding:

The "family" of time delay relay modules, model # ST82U (including model # ST82U1004) is classifiable under subheading 8536.41.00, HTSUS, which provides for other electrical relays for a voltage not exceeding 60V.

Effect on Other Rulings:

NY F89832 is revoked. In accordance with 19 U.S.C. §1625 (c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton

Senior Judges

Herbert N. Maletz*
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

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* Died January 6, 2002.

Decisions of the United States Court of International Trade

(Slip Op. 02–4)

ASOCIACION DE PRODUCTORES DE SALMON Y TRUCHA DE CHILE AG, PLAINTIFF *v.* U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANT, AND COALITION FOR FAIR ATLANTIC SALMON TRADE, DEFENDANT-INTERVENOR

Court No. 98–09–02759

[ITC positive injury determination sustained.]

(Dated January 9, 2002)

Arnold & Porter (Michael T. Shor and *Kevin T. Traskos),* for plaintiff Asociación de Productores de Salmón y Trucha de Chile AG.

Lyn M. Schlitt, General Counsel; *James A. Toupin,* Deputy General Counsel; *Tina Potuto,* Attorney, Office of the General Counsel, U.S. International Trade Commission, for defendant.

Collier, Shannon, Rill & Scott, PLLC (Michael J. Coursey, Kathleen W. Cannon, and *John M. Herrmann),* for defendant-intervenor Coalition for Fair Atlantic Salmon Trade.

OPINION

Goldberg, SENIOR JUDGE: In this action, the Court reviews a challenge to the final determination of the United States International Trade Commission (the "Commission" or the "ITC") in *Fresh Atlantic Salmon from Chile,* USITC Pub. 3116, Inv. No. 731–TA–768 (July 1998)*("Final Determination"),* as modified by the Commission's three views on remand. *See Notice: Fresh Atlantic Salmon from Chile,* 63 Fed. Reg. 40,315 (July 28, 1998) (notice of *Final Determination); Fresh Atlantic Salmon From Chile, Commission Determination on Remand,* USITC Pub. 3244, Inv. No. 731–TA–768 (Remand) (October 1999) *("Views on First Remand"); Fresh Atlantic Salmon From Chile,* USITC Pub. 3347, Inv. No. 731–TA–768 (Second Remand) (August 2000) *("Views on Second Remand"); Fresh Atlantic Salmon From Chile,* USITC Pub. 3357, Inv. No. 731–TA–768 (Third Remand) (September 2000) *("Views on Third Remand").* Plaintiff Asociación de Productores de Salmón y Trucha de Chile AG ("Asociación") argues that the positive injury determinations of both Commissioner Lynn M. Bragg ("Commissioner

Bragg") and Commissioner Marcia E. Miller ("Commissioner Miller") were neither in accordance with law nor supported by substantial evidence.

The Court exercises jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (1994). The Court sustains the ITC's *Final Determination* as modified by the three views on remand.

BACKGROUND

In June 1997, after the Coalition for Fair Atlantic Salmon Trade ("FAST") filed a petition seeking antidumping and countervailing duties on fresh Atlantic salmon from Chile, the Commission instituted antidumping and countervailing duty investigations of fresh Atlantic salmon from Chile. *See Fresh Atlantic Salmon from Chile,* 62 Fed. Reg. 33,678 (June 20, 1997). In August 1997, the Commission rendered an affirmative preliminary injury determination. *See Fresh Atlantic Salmon from Chile,* 62 Fed. Reg. 42,262 (Aug. 6, 1998). In January 1998, the U.S. Department of Commerce ("Commerce") rendered a preliminary affirmative determination of sales at less than fair value. *See Fresh Atlantic Salmon from Chile: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponenment of Final Determination,* 63 Fed. Reg. 2664 (Jan. 16, 1998).

In July 1998, Commissioner Bragg concluded that the U.S. fresh Atlantic salmon industry was threatened with imminent material injury by reason of subject Chilean imports. *See Final Determination* at 3. Commissioner Miller concluded that the U.S. industry was currently materially injured by reason of such imports. *See id.* Commissioner Crawford determined that the domestic industry was neither materially injured nor threatened by reason of the subject imports. *See id.* As a result of a 2–1 vote, the Commission made an affirmative injury determination. *See id.*

On August 27, 1998, the Asociación appealed the Commission's affirmative injury determination to this Court. The Asociación argued that the determination was not supported by substantial evidence and was contrary to law in its (a) utilization of record evidence, (b) the Commission's discussion of injury causation and, (c) the effects of dumping margins. Subsequently, the Commission filed a motion with the Court seeking a voluntary remand to determine whether its calculation of foreign production and capacity data was in error, and to allow the Commission to reconsider, if necessary, its affirmative threat determination. On July 2, 1999, the Court granted the Commission's motion and directed the Commission to reopen the record to "verify the accuracy of its foreign production, shipments and capacity data" and to "take any action necessary after reexamining the foreign production, shipments and capacity data." *Asociación de Salmón y Trucha de Chile AG v. United States International Trade Commission et al.,* Slip Op. 99–58, 1999 WL 486540 (July 2, 1999).

In October 1999, after reconsidering the data, and accepting new data from interested parties, the Commission again determined that there

was a threat of material injury to the American fresh Atlantic salmon industry. *See Views on First Remand.* The Court, however, was not satisfied that the Commission accurately verified the foreign production, shipments, and capacity data.

Therefore, the Court issued *Asociación de Productores de Salmón y Trucha de Chile AG v. United States International Trade Commission et al.*, Slip Op. 00–87, 2000 WL 1051973 (July 27, 2000) *("Second Remand Order")* directing the Commission to "either (1) adjust the 1998 production data for the consolidated subject producers or (2) to justify the determination that the 1998 production data is, as is, the best information available to it."

In response to the *Second Remand Order,* in August of 2000, the Commission filed the *Views on Second Remand.* There the Commission found, among other things, "that information necessary to [its] determination is not available on the record, and the unadjusted [1998 production] data are the facts otherwise available for [the Commission] to reach [its] determination. 19 U.S.C. § 1677e(a)." *See Views on Second Remand* at 9 n.27.

Again, the Court found the Commission's response to be lacking. Specifically, the Commission failed to explain how it had complied with the statutory requirements for adopting facts otherwise available. *See* 19 U.S.C. §§ 1677e, 1677m (1994). The Court remanded to the Commission once again in *Asociación de Productores de Salmón y Trucha de Chile AG v. United States International Trade Commission et al.,* Slip Op. 00–117, 2000 WL 1279826 (September 8, 2000). The Commission then issued its *Views on Third Remand,* explaining that it did utilize facts otherwise available and why it choose to do so.

Standard of Review

The Commission's *Final Determination* will be sustained if it is supported by substantial evidence on the record and is otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B) (1994).

To determine whether the Commission's interpretation of a statute is in accordance with law, the Court applies the two-prong test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). *Chevron* first directs the Court to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. To do so, the Court must look to the statute's text to ascertain "Congress's purpose and intent." *Timex V.I., Inc. v. United States,* 16 Fed. Cir. (T) ____, ____, 157 F.3d 879, 881 (1998) (citing *Chevron,* 467 U.S. at 842–43 & n.9). If the plain language of the statute is not dispositive, the Court must then consider the statute's structure, canons of statutory interpretation, and legislative history. *See id.* at ____, 157 F.3d at 882 (citing *Dunn v. Commodity Futures Trading Comm'n,* 519 U.S. 465, 470–80 (1997)); *Chevron,* 467 U.S. at 859–63. If, after this analysis, Congress's intent is unambiguous, the Court must give it effect. *See Timex V.I., Inc.,* 16 Fed. Cir. (T) at ____, 157 F.3d at 882.

If the statute is either silent or ambiguous on the question at issue, however, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 (footnote omitted). Thus, the second prong of the *Chevron* test directs the Court to consider the reasonableness of the Commission's interpretation. *See id.* The level of deference afforded an agency interpretation is directly related to the extent to which Congress explicitly delegated authority to the agency to make such an interpretation, as well as the manner in which the interpretation was promulgated. *See U.S. v. Mead Corp.*, 533 U.S. 218, ____, 121 S.Ct. 2164, 2171 (2001).

With respect to the Commission's factual findings, the Court will sustain the Commission's determinations if they are supported by substantial evidence. "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) (citations omitted), *aff'd*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987). In applying this standard, the Court must sustain the Commission's factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions. *See Atlantic Sugar, Ltd. v. United States*, 2 Fed. Cir. (T) 130, 137, 744 F.2d 1556, 1563 (1984).

DISCUSSION

I. The Commission's Threat of Material Injury Determination is in Accordance with Law and Supported by Substantial Evidence.

Under U.S. law, an affirmative threat determination requires the Commission to find that "further dumped or subsidized imports are imminent and [that] material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted * * *." 19 U.S.C. § 1677(7)(F)(ii) (1994). Affirmative threat determinations must be based on "positive evidence tending to show an intention to increase levels of importation." *BIC Corp. v. United States*, 21 CIT 448, 464, 964 F. Supp. 391, 405 (1997) (quoting *Metallverken Nederland B.V. v. United States*, 14 CIT 481, 488, 744 F. Supp. 281, 287 (1990)).

A. The Commission's Use of the Consolidated Data in Making Its Determination is in Accordance With Law and the Data is Substantial Evidence Supporting Its Threat of Material Injury Determination.

The Commission determined that there was a threat of material injury because "the subject producers have existing unused and imminent substantial increases in capacity that indicate the likelihood of substantially increased imports of the subject merchandise into the United States." *Views on First Remand* at 20. The Commission reasoned that the "subject producers will use expanded capacity and/or any increased capacity utilization to substantially increase their exports to the United States." *Final Determination* at 24. The Commission also found that the U.S. market was particularly vulnerable because the "demand for salm-

on in the United States is expected to continue growing in the future." *Views on First Remand* at 21.

Prior to the remands, the Asociación argued that in making its determination the Commission relied on improperly compiled subject producer data[1], including "double-counted"[2] data. *See* Initial Br. of Asociación de Productores de Salmón y Trucha de Chile AG in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("Pl.'s Initial Br.") at 16–19. After the three remands, the Asociación still maintains that the Commission improperly relied on double-counted data, not only because it is an insufficient basis for a threat determination, but also on the grounds that the Commission acted contrary to the statute in considering the double-counted data. *See* Pl.'s Mem. in Opp'n to Third Remand Determination and in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("Pl.'s Third Remand Memo").

1. The Commission's Treatment of the Consolidated Subject Producer Data is in Accordance with Law.

The Commission concedes that the consolidated subject producer data contains some inaccurate data. *See Views on Third Remand* at 5. In its *Views On Third Remand*, however, the ITC states that its use of the imperfect data is permissible under 19 U.S.C. §§ 1677e(a) and 1677m(d).[3] The Commission reasons that the data cannot be recalculated to remove the double-counted information because the Asociación was unable to provide the Commission with deconsolidated production data for Fiordo Blanco—the producer that was double-counted. *See*

---

[1] Compiled subject producer data consists of "consolidated subject producer data" and subject producer data submitted by larger individual salmon producers. The "consolidated subject producer data" is data that was submitted by the Asociación at the request of the Commission. The data represents the production and capacity information for a number of smaller Chilean salmon producers, including production and capacity data for Fiordo Blanco. The data that was submitted individually by the larger Chilean salmon producers included data from Fiordo Blanco.

[2] "Double-counting" is a term utilized by the parties in this proceeding to explain that one of the Chilean producers, Fiordo Blanco, may have been accounted for twice in the data compilation. It does not mean that Fiordo Blanco's data is exactly doubled, only that data may have been included twice.

Fiordo Blanco separately submitted *actual* production and capacity data for 1998 to the Commission. *See Views on Second Remand* at 10. In its submission, the Asociación also included in its 1998 consolidated subject producer data *estimated* Fiordo Blanco production and capacity levels. *See id.* Therefore, Fiordo Blanco was included twice, as both an individual producer and as part of the consolidated producers represented by the Asociación's data. Since the Asociación did not provide the Commission with a breakdown of its 1998 data so that the Commission could remove the *estimated* Fiordo Blanco data from the consolidated subject producer data, the ITC considered whether to follow the Asociación's proposed solution to exclude the *actual* Fiordo Blanco production and capacity levels from the 1998 subject producer data. *See Views on Third Remand* at 5; *Views on Second Remand* at 10; Pl.'s Mem. in Opp'n to Third Remand Determination and in Supp. of Rule 56.2 Mot. for J. on the Agency R. at 2.

The Commission rejected this alternative since it appeared likely that the actual production and capacity levels for Fiordo Blanco were much higher than what the Asociación had estimated as Fiordo Blanco's 1998 production and capacity levels. *See Views on Second Remand* at 10. If the *actual* levels were not included in the subject producer data, the resulting figures would underestimate the subject producers' production and capacity levels for 1998. *See id.*

[3] Section 1677e(a) provides:

> (a) In general
> If—
>
> (1) necessary information is not available on the record, or
> (2) an interested party or any other person—
> (A) withholds information * * *,
> (B) fails to provide such information * * *,
> (C) significantly impedes a proceeding under this subtitle, or
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,
>
> The administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. 1677e(a).

Continued

Views on Third Remand at 5–6. The Commission claims that it acted in accordance with 19 U.S.C. § 1677e(a) in using "facts otherwise available," specifically the imperfect consolidated producer data. *See id.* at 6. The ITC further states that the notice requirements of § 1677m(d) are not implicated in this case because the Asociación never failed to comply with a request for information. *See id.* at 6–7.

The Asociación argues that the Commission's treatment of the production data is not in accordance with law. First, the Asociación claims that the ITC's determination is inconsistent with the statute authorizing use of facts otherwise available, 19 U.S.C. 1677e(a). *See* Pl.'s Third Remand Memo at 2. The Asociación argues that the statute does not authorize the Commission to utilize data known to be incorrect; rather it compels the Commission to use facts otherwise available to correct imperfect data where the preferred data is not available. *See id.* The Asociación claims that there is data on the record that the Commission can utilize to avoid double-counting, and that the statute compels the Commission to do just that.[4] *See id.* at 2–3.

Second, the Asociación argues that the Commission has made an impermissible adverse inference[5] against the subject producers by valuing Fiordo Blanco's contribution to the Asociación's consolidated subject producer data at zero.[6] *See id.* at 3. The Asociación alleges that the adverse inference was impermissible because the Commission never found a deficiency in any Chilean data response. *See id.* (citing 19 U.S.C. § 1677e(b)).

The Court finds that the Commission properly relied upon facts otherwise available in considering the imperfect 1998 consolidated subject producer data. *See* 19 U.S.C. § 1677e(a)(2)(D). After determining that the information on the record was imperfect, the Commission used the imperfect 1998 consolidated subject producer data to arrive at what, in its view, best approximated the likely capacity of subject producers in 1998. The Commission went to some lengths to explain why it chose to utilize the unadjusted 1998 consolidated subject producer data as facts

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Section 1677m(d) states:

> (d) Deficient submissions
>
> If the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle.

19 U.S.C. 1677m(d).

[4] The Asociación claims that the Commission can avoid doublecounting by excluding the *actual* Fiordo Blanco production and capacity levels for 1998 from the subject producer data. Pl.'s Third Remand Memo at 2; *see also supra* n.1.

[5] If the Commission finds that the respondent "has failed to cooperate by not acting to the best of its ability to comply with a request for information * * * [the Commission] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b).

[6] The Asociación argues that the Commission effectively valued Fiordo Blanco's *estimated* 1998 production and capacity levels, which were included in the consolidated subject producer data, at zero. Pl.'s Third Remand Memo at 2. That is, the ITC subtracted nothing from the 1998 consolidated subject producer data, and made no adjustment to the consolidated subject producer data to remedy the double-counting. The Commission did so because it found no adjustment to be a better estimate of the likely production and capacity levels of subject producers in 1998. *See Views on Third Remand* at 6; *Views on Second Remand* at 17. In *Views on Second Remand*, the Commission tried two different adjustments to the capacity and production data to remove Fiordo Blanco data from the Asociación's consolidated subject producers data. *Views on Second Remand* at 11–18. Both adjustments affirmed the ITC's initial conclusion that the U.S. industry is threatened with material injury by reason of subject imports from Chile. *Id.* at 17. However, because of problems with the Asociación's data, the Commission decided to rely on the unadjusted 1998 subject producers' production and capacity data. *Id.*

otherwise available. *See Views on Second Remand* at 9. The ITC reasoned that the Asociación had underestimated production levels, admitted making unidentified "clerical errors," and was unable to parse its original consolidated subject producer data to account for the included Fiordo Blanco data. *See id.* at 8 n.25. Thus, the Commission decided that to make any more adjustments would only "further exacerbate[] overall data problems." *Id.* at 9.

The Commission also explained why she chose not to employ the methodology favored by the Asociación, namely to exclude the separately submitted Fiordo Blanco production and capacity levels from the total subject producers data. *See id.* at 10. The Commission surmised that the Asociación likely calculated its 1998 Fiordo Blanco data from the production and capacity data it assigned to Fiordo Blanco in 1997. Because Fiordo Blanco reported significant increases in 1998, the Commission reasoned that the Asociación's calculation of consolidated subject producer data included underestimated 1998 Fiordo Blanco data. Thus, subtracting the reported Fiordo Blanco production and capacity level data from the 1998 consolidated subject producer data would likely inaccurately diminish the consolidated subject producer data, rendering the numbers even more inaccurate. *See Views on Second Remand* at 10.

The Commission's chosen data set was reasonable because, faced with a choice between imperfect alternatives, the ITC opted for the one that it considered less inaccurate. *See Fabrique de Fer de Charleroi S.A. v. United States*, 25 CIT ____, ____, 155 F. Supp. 2d 801, 809 (2001) ("Making a determination based on facts available, [the Commission] should: (1) strive to arrive to 'the most reasonable estimate,' * * * and (2) rely on the data that has a 'rational relationship * * * [to] the matter.'") (quoting *National Steel Corp. v. United States*, 18 CIT 1126, 1132, 870 F. Supp. 1130, 1136 (1994)); *see also Acciai Speciali Terni S.P.A. v. United States*, 25 CIT ____, ____, 142 F. Supp. 2d 969, 989–94 (2001) (Commerce could not use certain data as adverse facts otherwise available because it was "inherently distortive and unreasonable," but Commerce could use other data to draw adverse facts otherwise available because it was "a reasonable choice of facts, which certainly falls within the Department's discretion"). As discussed above, the Commission's decision to use the unadjusted 1998 consolidated subject producer data as facts otherwise available was reasonable under section 1677e(a). Further, the Asociación has not persuaded the Court that its proposed adjustment is any less inaccurate, or more reasonable, than the Commission's position.

Moreover, contrary to the Asociación's argument, the Commission did not value the Asociación's Fiordo Blanco data at zero. The ITC assumed that the Asociación included Fiordo Blanco data in the consolidated data, but the Commission had no way of knowing what that value

was in order to subtract the double-counted Fiordo Blanco data.[7] What the Commission did find, however, was that the aggregate consolidated data was likely underestimated. *See Views on Second Remand* at 9 n.26.[8] In choosing among the two adjusted data sets, discussed *infra* note 6, and the unadjusted subject producer data, the ITC chose to use the data it considered to be more accurate—unadjusted subject producer data. Thus, the Asociación's claim that the Commission made an impermissible adverse inference is without merit.

2. The Consolidated Data is Part of the Substantial Evidence Supporting The Commission's Positive Material Injury Determination.

The Asociación argues that the Commission's decision to utilize facts otherwise available prevents the capacity and production data from constituting substantial evidence because it values Fiordo Blanco's data at zero. *See* Pl.'s Third Remand Memo at 3. The Asociación also argues that even if using the double-counted 1998 data were valid, the slight increase in production and capacity between 1997 and 1998 would not support the Commission's positive injury determination. *See id.* at 5. Thus, the Asociación claims, the consolidated subject producer data cannot be used as substantial evidence to support the positive injury determination. *See id.*

The Court finds that the consolidated data is part of the substantial evidence supporting the Commission's positive injury determination. First, as explained *supra*, the ITC did not consider Fiordo Blanco's consolidated data to be zero. Second, the increase in production between 1997 and 1998, however slight, is substantial evidence supporting the Commission's determination, because it is only part of the total "trend" evidence upon which the Commission based its determination. *See infra* § I.B.1.

B. The Commission's Finding that the Subject Producers Would Substantially Increase Exports to the United States in the Imminent Future by Increasing Their Capacity and Capacity Utilization is in Accordance with Law and Supported by Substantial Evidence.

In the *Final Determination* the ITC found that subject Chilean producers of fresh Atlantic salmon "will use expanded capacity * * * to substantially increase their exports to the United States." *Final Determination* at 24. The Asociación argues that the Commission's de-

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[7] In fact, the Commission gave the Asociación ample opportunity to provide a breakdown of the 1998 aggregate data in the first remand proceeding. The Asociación was able to supply a breakdown for the 1994–1997 data, but was unable to do so for the 1998 data. *See* App. to Reply Br. of Asociación de Productores de Salmón y Trucha de Chile AG in Supp. of Rule 56.2 Mot. for J. on the Agency R. 53, Supplemental Questions Relating to Foreign Producer: Questionnaire Response of Asociación de Productores de Salmón y Trucha de Chile AG at Q1. This is why the Commission adjusted the 1994–1997 data to account for the double-counting, but declined to do so for the 1998 data. *See Views on Second Remand* at 9.

[8] The Commission explained, as follows, why it found that the aggregate consolidated data was likely underestimated:

> [The Commission] believe[s] that the Asociación's estimates of production generally under report the amount of production for each producer. Their estimates for Fiordo Blanco, for example, were far off the mark and substantially under the amount reported by Fiordo Blanco for its future production * * *. Moreover, the Asociación's methodology requires production to be equal to exports. In fact, they have admitted that production does not equal exports because some production does go to home market shipments * * *. Consequently, the Asociación's production numbers understate the actual production of the Chilean producers.

Views on Second Remand at 9 n.26.

termination that the subject producers will expand capacity, and capacity utilization, to substantially increase their exports to the United States is not supported by substantial evidence. *See* Pl.'s Initial Br. at 20. The Court does not agree.

1. The Commission's Conclusion that the Subject Producers Would Increase Capacity is in Accordance with Law and Supported by Substantial Evidence.

The Asociación argues that the Commission improperly disregarded Asociación data in determining that subject producers would increase capacity. *See* Reply Br. of Asociación de Productores de Salmón y Trucha de Chile AG in Supp. of Rule 56.2 Mot. for J. on the Agency R. ("Pl.'s Reply Br.") at 8. The Asociación claims that the foreign producers' questionnaire, the only record evidence regarding Chilean producers' capacity *as a whole*, was incorrectly interpreted to show an increase in future capacity. *See* Pl.'s Initial Br. at 20–21. The Asociación also claims that the Commission misinterpreted the data because capacity is absolutely constrained by the amount of fish produced plus mortality.[9] *See id.* at 22–23. Finally, the Asociación claims that any plans to increase capacity could not be realized in the "imminent future" because of the constraints of the three-year production cycle for Atlantic salmon. *See id.* at 21.[10]

As a threshold matter, the Asociación's argument that the Commission ignored or disregarded its data is without merit. The Commission explicitly stated that it accepted the Asociación's production and capacity level data concerning the consolidated subject producers. *See Views on First Remand* at 14. The Commission duly considered the Asociación's consolidated data purporting to show that consolidated producers would decrease capacity in the future, but found the evidence of the producers that reported independently to be more persuasive. The law is clear that the Commission does not have to explicitly address all information presented to it, only that it consider it. *See* 19 U.S.C. § 1677m(e). *Ranchers-Cattlemen Action Legal Foundation v. United States*, 23 CIT ____, ____, 74 F. Supp. 2d 1353, 1379 (1999) ("the fact that the ITC chose not to focus on certain data in its main report does not indicate that the ITC failed to consider that information as 'there is no statutory requirement that the Commission respond to each piece of evidence presented by the parties'") (quoting *Granges Metallverken AB v. United States*, 13 CIT 471, 477, 716 F. Supp. 17, 24 (1989)). The independently reported data indicated that [ ] producers would increase their capacity levels, and from this information the Commission reasonably concluded that subject producers as a whole would increase their capacity. *See Views on*

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[9] "Mortality" simply means the number of fish that died after they were placed in ocean pens. The Commission expressly accepted the Asociación's data, stating that it "used the data reported by the Asociación to assess the production and capacity levels of the consolidated subject producers in this remand investigation." *Views on First Remand* at 14.

[10] The production cycle for freshwater salmon is from 33 to 45 months. *See* Pl.'s Initial Br. at 6 (citing App. to Pl.'s Initial Brief 3, Commission Final Staff Report, July 1998, Public Version at I–3 to I–4). The Commission agreed: "It takes three years for farmed salmon to reach the optimum size for sale in the market * * *. Given the length of the production cycle, the ability of salmon producers to increase production levels rapidly to satisfy demand is clearly constrained." *Final Determination* at 17.

First Remand at 22–23. As a result, this Court finds that the Commission did not disregard the Asociación's data, but merely found other evidence on the record to be more persuasive. *See Goss Graphics Systems, Inc. v. United States*, 22 CIT 983, 1004, 33 F.Supp. 2d 1082, 1100 (1998) ("The Commission has the discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis."), *aff'd*, 18 Fed. Cir. (T) ____, 216 F.3d 1357 (2000).

Further, the Commission concluded that imports were likely to increase in the imminent future primarily by examining the "trend" evidenced by the yearly data of the subject producers. *See Views on First Remand* at 21. The ITC found that the subject producers as a whole increased their production and capacity levels each year and thus a threat of increased capacity utilization was substantial in the imminent future. *See id.* The Court of International Trade has previously approved such a "trend" analysis as reasonable. *See Bando Chem. Indus., Ltd. v. United States*, 17 CIT 798, 807 (1993), *aff'd*, 26 F.3d 139 (1994)(finding that Commission reasonably inferred from overall trend of data that increased production likely destined for U.S. market); *Iwatsu Elec. Co., Ltd. v. United States*, 15 CIT 44, 55, 758 F. Supp. 1506, 1515–16 (1991) (upholding use of imperfect data as trend indicator).

The Commission's trend analysis was based on a reasonable one-year capacity calculation.[11] The Commission recognized that capacity was constrained by the amount of harvestable fish in the water in any given year.[12] The Commission, however, realized that this constraint was not absolute.[13] Most importantly, due to the ITC's yearly trend analysis, the Commission did not need to rely on evidence of the three year Atlantic salmon production cycle.

Moreover, the Court finds that the one-year capacity evidence is substantial evidence supporting the Commission's conclusion. The original and the revised data demonstrate [ ]. *See* Apps. to Pl.'s Initial Br. ("Pl.'s Initial App.") 6, 9, 10, 12, 16, Questionnaire Responses of Foreign Producers at 4; *Views on First Remand* at 20; App. to Pl.'s Reply Brief 56,

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[11] Although the Commission certainly could have conducted a capacity analysis differently, as discussed *infra*, the yearly trend analysis is a permissible method of finding a imminent threat of increased capacity utilization.

[12] Capacity is based on the calculation of the number of fish produced in addition to the number of fish that died during a year. *See Views on First Remand* at 18. As the Commission explained,

> a producer's capacity level in a particular year is constrained by the number of harvestable fish that were in the water at the beginning of any particular year and that, therefore, a producer's capacity for that particular year is arguably equal to its production for the year plus the number of harvestable fish that died during the year as the Asociación asserts.

Id. at 17–18.

[13] For example, mature salmon can be "held over" from year to year if market conditions are not attractive for harvest. *See* App. to Pl.'s Initial Br. 2, ITC Staff Report at I–5. Holding over can affect capacity beyond the Asociación's simplified production plus mortality calculation by keeping additional capacity (the held-over salmon) from production. *See id.* Capacity can also be affected by the addition of developing salmon at different stages of the three-year cycle. *See id.* at I–4 (producers sometimes purchase "smolt" or 18 month old salmon). Lastly, the record demonstrates that there may not be a direct correlation between number of fish and capacity because production is not measured in number of fish, but rather in pounds. *See id.* at II–2, VI–2. Thus, climate changes or feeding practices may affect production. *See id.*

Comm'n Staff Report in Remand Proceeding at Tables A–1 to A–4.[14] And the record evidence demonstrated that [ ]. *See* Pl.'s Initial Apps. 9, 10, 16, Responses to Commission's Foreign Producers' Questionnaire. This evidence supports the ITC's determination that subject producers will increase capacity in the future.

The Court also finds meritless the Asociación's argument that "imminent," as a matter of law, cannot mean within one to two years. *See* Pl.'s Reply Br. at 33–34. The Commission concluded that subject producers could increase shipments to the United States "within one to two years." *See Views on First Remand* at 18 n.74. The Asociación argues that, due to the three-year production cycle, no capacity change could be realized within three years. *See* Pl.'s Initial Br. at 24. Further, the Asociación argues that, as a matter of law, "imminent" cannot mean "within one or two years" and thus the Commission has violated the statute by finding that increased capacity utilization could lead to imminent increases in subject imports. *See* Final Br. of Asociación de Productores de Salmón y Trucha de Chile AG in Opp'n to First Remand Determination and in Supp. of Rule 56.2 Mot. for J. on the Agency R. at 38–39.

No bright-line test exists to determine when injury is imminent. Congress, however, is presumed to have used words in their ordinary meaning, absent a contrary expressed intent. *See Camargo Correa Metais, S.A. v. United States*, 18 Fed. Cir. (T) ____, ____, 200 F.3d 771, 773 (1999). The Court need not defer to the Commission's interpretation because "Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I., Inc. v. United States*, 16 Fed. Cir. (T) ____, ____, 157 F.3d 879, 881 (1998).

Both the dictionary definition and case law from the CIT demonstrate that the statutory term "imminent" only means impending. *See The Oxford English Dictionary* 685 (2d Ed. 1989)(defining "imminent" as "impending"); *see also Goss Graphics*, 22 CIT at 1007–1008, 33 F. Supp. 2d at 1103 (finding that the Commission reasonably found imminent harm to domestic industry when financial effects of dumped subject imports would not manifest themselves for two or more years). The term does not necessarily mean, as the Asociación argues, immediate, as the statute does not establish any specific time limit governing when a potential action can be characterized as imminent. In each case the Commission should look at the facts and circumstances of the industry, product, and marketplace to determine if further dumped or subsidized imports are imminent.

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[14] Secondary evidence on the record also supported the Commission's finding. *See* E. Alan Kenny, *The Current Status and Future Outlook of Global Salmon Markets: Implications for Canadian Salmon Farmers* at 49 (November 1996) (in Pl.'s Initial Apps. 25) (showing that Chile had the highest rate of growth in farmed salmon production between 1991 and 1995 and that Chile increased its exports to the United States, accounting for roughly 56 percent of total U.S. supply by the year 2000).

2. The Commission's Conclusion that Subject Producers Would Increase Capacity Utilization is Supported by Substantial Evidence and in Accordance with Law.

The Commission also found that the capacity utilization levels for all subject producers declined between 1996 and 1997. *See View on First Remand* at 21. The Commission determined that the subject producers were likely to increase production through the utilization of this unused capacity. *See id.* It reasoned that they would have incentive to do so because the United States is the largest export market for the subject producers, and U.S. demand is increasing. *See id.*

This Court has previously recognized that incentives exist for subject producers to expand production when low capacity utilization exists. *See Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1220, 1221–22, 704 F.Supp. 1075, 1095, 1097 (1988) (upholding Commission finding that increased production capacity, and low utilization levels, would result in increased exports to the United States when, among other things, the United States is a major market for exporting companies). Accordingly, the Court finds the Commission's conclusion that subject producers will increase production through utilization of the unused capacity to be reasonable.

C. The Commission's Finding that the Subject Producers Could Substantially Increase Exports to the United States in the Imminent Future by Shifting Production from Other Seafood Products to Salmon is in Accordance with Law and Supported by Substantial Evidence.

The Commission also found that "subject producers have potential to shift production from other seafood products to salmon." *Final Determination* at 23. The Asociación argues that as a matter of law such a finding of "potential" production shift is based on impermissible speculation and cannot support a threat finding. *See* Pl.'s Initial Br. at 24. Further, the Asociación argues that there is no record evidence that subject producers as a whole planned to shift production from other products to salmon. *See id.* at 25. The Court finds that the ITC's consideration of the potential for subject producers to shift from other seafood products to salmon, together with the other record evidence, supports its finding that subject producers would substantially increase exports, and that this finding is not mere conjecture. In fact, the statute *requires* the Commission to consider the potential for product-shifting. *See* 19 U.S.C. § 1677(7)(F)(i)(VI).

The record evidence supports the Commission's finding that production potentially will shift from other seafood products to salmon. *See Final Determination* at 23 n.168. In fact, the Asociación's own data supports the Commission's conclusion. The record evidence demonstrates that the Asociación only reported home market production and shipment of salmon further processed into cut salmon. The record indicates that a significant amount of the Asociación's production in 1997 was processed into frozen or smoked salmon. *See Views on First Re-*

mand at 9–10. Thus, the Asociación possessed the ability to shift a significant amount of its production from one channel of trade—smoked and frozen salmon, to another—cut salmon. *See id.; U.S. Steel Group v. United States,* 18 CIT 1190, 1222, 873 F. Supp. 673, 701 (1994) (when assessing the risk of product shifting the Commission may look to, among other things, the channels of trade available for such shifting).

Moreover, record evidence demonstrates that the subject producers had an incentive to shift production. Fresh salmon commands a price premium over frozen and smoked salmon. *See Views on First Remand* at 23. The evidence also shows that there is a "surprisingly low consumption of smoked salmon" in the United States. *See* Audun Lem & Maria Di Marzio, *The World Market for Salmon* 33 (GLOBEFISH Research Programme, Vol. 44, FAO) (May 1996) ("GLOBEFISH Research") (in App. to Def. U.S. Int'l Trade Comm.'s Mem. in Opp. to Pl.'s Mot. for J. on the Agency R. ("Def. App.") Conf. List Doc. 13, App. to Pet'r's Pre-hearing Br.). It was reasonable, and not mere conjecture, for the Commission to conclude that Chilean producers would likely shift away from those products with low demand in the United States, namely smoked salmon, toward salmon cuts, the product with the price premium.

D. The Commission's Finding that the Subject Producers Could Substantially Increase Exports to the United States in the Imminent Future By Shifting Exports From Other Markets to the United States is in Accordance with Law and Supported by Substantial Evidence.

The Commission also supported its positive injury determination with "evidence that subject producers have potential to shift * * * exports from other markets to the U.S." *Final Determination* at 23. Again, the Asociación claims that this is mere speculation and that the finding is not supported by record evidence. *See* Pl.'s Initial Br. at 25. The Court finds that the Commission's consideration of the potential for subject producers to shift products between markets, together with the other record evidence, supports its positive injury determination and is not mere conjecture.

As with respect to the issue of product-shifting, *see supra* when considering the record evidence in this context, the Court must bear in mind that the Commission is only statutorily mandated to consider whether there is a "potential" for shifting. *See* 19 U.S.C. § 1677(7)(F)(i)(VI). The record evidence demonstrates that salmon producers are able to shift their production between countries in responses to changes in the market. *See* Def. App. Conf. List 13, App. to Pet'r's Prehearing Br., at App. 2 (LECG Economic Report). The Asociación offers no countervailing evidence; indeed, its own economic analysis suggests that the United States market is more attractive than other markets. *See* GLOBEFISH Research at 28–30. Therefore, the substantial evidence supports the Commission's conclusion that, at a minimum, there is a potential for shifting exports from other markets to the United States.

II. The Determinations of Both Commissioners Bragg and Miller are Supported by the Causation Analysis Required by the Statute.

Under U.S. law, where there is evidence that the U.S. industry is injured, or threatened with injury, by factors other than less than fair value imports, the Commission must consider all relevant economic factors. 19 U.S.C. § 1677(7)(C)(iii); *see Gerald Metals, Inc. v. United States,* 16 Fed. Cir. (T) ____, ____, 132 F.3d 716, 722–23 (1997); *Suramerica de Aleaciones Laminadas, C.A. v. United States,* 13 Fed. Cir. (T) 34, 38–39, 44 F.3d 978, 984 (1994); *Taiwan Semiconductor Indus. Ass'n v. United States,* 23 CIT ____, ____, 59 F. Supp. 2d 1324, 1329 (1999), *aff'd,* 19 Fed. Cir. (T) ____, 266 F.3d 1339 (2001). The statute provides that the Commission "shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States * * *." 19 U.S.C. § 1677(7)(C)(iii). The Statement of Administrative Action states that the Commission is required to "examine all relevant evidence including any known factors, other than the dumped * * * imports which at the same time are injuring the domestic industry." Statement of Administrative Action on the Uruguay Round Agreements Act, *reprinted in* H.R. Doc. No. 103–316(I) (1994) ("SAA") at 851 (internal quotes omitted). The SAA, however, also indicates that in examining other causes of injury, the Commission is not required to isolate the effects of subject imports from other factors contributing to the injury. *See id.*

In *Gerald Metals* the Federal Circuit expressly construed the SAA provisions to require analysis of the alternative sources of injury. *See* 16 Fed. Cir. (T) at ____, 132 F.3d at 722–23. The Asociación claims that in this case both Commissioner Bragg and Commissioner Miller failed to comply with this requirement.[15]

A. Commissioner Bragg's Determination

The Asociación argues that Commissioner Bragg failed to discuss global market forces as an alternative source of injury. *See* Pl.'s Initial Br. at 29, 34. In its brief, the Asociación points to numerous pieces of record evidence that it claims establish the existence of such a global market. *See id.* at 29 n.93.

The Court finds that Commissioner Bragg did not err by declining to explicitly discuss the tangential issue of the global market for salmon. The Commission need not address every issue presented to it. *See Dastech Int'l, Inc. v. United States Int'l Trade Comm'n,* 21 CIT 469, 476, 963 F. Supp. 1220, 1226 (1997). In fact, the SAA makes clear that the Commission must only "examine all relevant evidence including any known factors, other than the dumped * * * imports which at the same time are injuring the domestic industry." SAA at 851 (internal quotes omitted). The law requires only that the Commission examine alternative causes. "Absent some showing to the contrary, the Commission is presumed to

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[15] The Commission's *Final Determination* was made in a two to one vote. *Final Determination* at 1. Commissioners Bragg and Miller's views "comprised the Commission's affirmative determination" in the *Final Determination*. *Views on First Remand* at 1. Therefore, the Asociación's separate challenges to the views of Commissioners Bragg and Miller are challenges to the views of the Commission.

have considered all evidence in the record." *Rhone Poulenc, S.A. v. United States*, 8 CIT 47, 55, 592 F. Supp. 1318, 1326 (1984). The evidence indicates that Commissioner Bragg declined to address the global market because she did not consider it to be injuring the domestic industry.

The Asociación also charges that in making her injury analysis, Commissioner Bragg failed to distinguish between harm caused by a shift in consumer preference and harm caused by less than fair value imports. *See* Pl.'s Initial Br. at 37–38 (citing *Final Determination* at 17, 21). Specifically, the Asociación points to Commissioner Bragg's statement that "once the shift in the market toward cuts and away from whole salmon develops more fully, the domestic industry will experience material injury as subject imports solidify their dominant position in the sale of cuts." *See Final Determination* at 21.

It is undisputed that there was a consumer shift in preference away from whole salmon to salmon cuts. *See Final Determination* at 21; Pl.'s Initial App. 3, Commission Final Staff Report, Public Version at C–6. Commissioner Bragg recognized this preference shift. *See Final Determination*, at 21. Commissioner Bragg's analysis of the relationship between the shift in consumer preference for salmon cuts and the effect of less than fair value imports was permissible. The Asociación claims that Commissioner Bragg failed to differentiate the two causes, but the case law is clear that she was not required to make bright-line distinctions. All Commissioner Bragg was required to do was to consider the alternative causes of injury and determine that the injury was "by reason of" the less than fair value imports. *See Gerald Metals*, 16 Fed. Cir. (T) at ____, 132 F.3d at 722–23. The Commission is not required to isolate the effects of subject imports from other factors contributing to injury. SAA at 851; *Taiwan Semiconductor*, 23 CIT at ____, 59 F. Supp. at 1329 n.9. In this case, by considering the shift in consumer preference to salmon cuts, Commissioner Bragg properly considered a changing condition of competition in the U.S. market as a context within which to analyze injury. By discussing such a context, Commissioner Bragg did not ignore a potential cause of injury.

Commissioner Bragg's discussion of the vulnerability of the domestic market due to a shift in consumer preference was not only permissible, it was required. Congress, in the SAA, makes clear that "[i]n threat determinations, the Commission must carefully assess current trends and competitive conditions in the marketplace to determine the probable future impact of imports on the domestic industry and whether the industry is vulnerable to future harm." SAA at 885. Commissioner Bragg properly recognized that the demand shift, not itself ascribable to subject imports, affects the conditions of competition between increasing subject imports and the domestic industry in the imminent future.

B. Commissioner Miller's Determination

The Asociación argues that Commissioner Miller addressed the evidence of global market forces, but failed to do so adequately. *See* Pl.'s Initial Br. at 35–37. The Asociación argues that Commissioner Miller

misunderstood the global price causation theory, claiming that she considered the existence of a global market to guarantee a single global price. *See id.* The Asociación argues that a global market only guarantees that prices move together or are correlated.

The Court finds that Commissioner Miller's causation analysis was in accordance with law. In her determination, Commissioner Miller addressed the global market causation argument. The Asociación's contention that she did not satisfy the requirement of *Gerald Metals* has no merit. *See* 16 Fed. Cir. (T) at ____, 132 F.3d at 722–23. She considered the global market causation theory to be a "relevant factor," explicitly evaluated it, and dismissed it. Chairman Miller's analysis therefore satisfied the requirements of 19 U.S.C. § 1677(7)(C)(iii). *See generally Final Determination* at 31–32 n.214.

III. Commissioner Bragg's Analysis of the Margin of Dumping is Consistent with the Statutory Scheme and is Supported by Substantial Evidence.

When making an injury determination the Commission is required to evaluate the magnitude of the dumping margin. *See* 19 U.S.C. § 1677(7)(C)(iii)(V) (1994). The Asociación argues that Commissioner Bragg failed to adequately consider the margin of dumping in her analysis.[16] The Asociación also argues that Commissioner Bragg's discussion, to the extent that it exists, misconstrues the statutory scheme and is unsupported by substantial evidence. *See* Pl.'s Initial Br. at 40–48.

Commissioner Bragg did adequately consider dumping margins in the *Final Determination,* reciting the margins of dumping found by Commerce and declining to attach any significance to the margins in this case. *Final Determination* at 20 n.145. *Cf. Coalition for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States,* 22 CIT 520, 532, 15 F. Supp. 2d 918, 929 (1998) *("Coalition")* ("[d]espite Plaintiff's allegation, the ITC expressly considered and subsequently determined that the material submitted by Plaintiff was of limited probative value. See Final Determination at 23, n.127"). The Court does not agree with the Asociación that Commissioner Bragg's treatment of the dumping margins was either contrary to the statutory scheme or unsupported by substantial evidence. The statute mandates that Commissioner Bragg address the dumping margins. *See* 19 U.S.C. § 1677(7)(C)(iii)(V). Here, Commissioner Bragg has done so. The Asociación alleges that Commissioner Bragg improperly construed the statutory scheme by dismissing the importance of the dumping margins in this particular case. Besides simply suggesting that her conclusion is wrong, the Asociación offers nothing to support its argument.[17] Nothing in the statutory scheme compels Commissioner Bragg to reach a certain conclusion con-

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[16] *See supra* note 15.

[17] The Asociaion offers Commissioner Crawford's reasoning as evidence of the lack of support for Commissioner Bragg's position. *See* Pl.'s Initial Br. at 47; *Mitsubishi Materials Corp. v. United States,* 20 CIT 328, 331, 918 F. Supp. 422, 425 (1996) ("the reviewing court may not 'even as to matters not requiring expertise * * * displace the [Commission's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo'") (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951)).

cerning the dumping margins—the statute only compels Commissioner Bragg to consider such margins. *See Coalition*, 22 CIT at 523, 15 F. Supp. 2d at 922 (quoting *U.S. Steel Group v. United States*, 14 Fed. Cir. (T) ____, ____, 96 F.3d 1352, 1362 (1996)); *Copperweld Corp. v. United States*, 12 CIT 148, 154–60, 682 F.Supp. 552, 560–565 (1988) (broad discretion in discussion of relevant injury factors).

CONCLUSION

For all of the foregoing reasons, the Court sustains the ITC's *Final Determination* as modified by the three remand determinations.

(Slip Op. 02–5)

AMERICAN SILICON TECHNOLOGIES, ELKEM METALS CO., GLOBE METALLURGICAL, INC., AND SKW METALS & ALLOYS, INC., PLAINTIFFS *v.* UNITED STATES DEFENDANT, AND COMPANHIA BRASILEIRA CARBURETO DE CALCIO, COMPANHIA FERROLIGAS MINAS GERIAS-MINASLIGAS, AND RIMA INDUSTRIAL S/A, DEFENDANT-INTERVENORS

Consolidated Court No. 97–02–00267

(Dated January 15, 2002)

ORDER

MUSGRAVE, *Judge:* This matter is before the Court on a motion by defendant-intervenor Companhia Brasileira Carbureto de Calcio ("CBCC") to stay this Court's judgment and extend the injunction on the liquidation of the subject merchandise pending CBCC's appeal in this action. After CBCC's motion was filed, counsel for plaintiffs American Silicon Technologies, Elkem Metals Company, Globe Metallurgical, Inc., and SKW Metals & Alloys, Inc. (collectively "American Silicon") conferred with counsel for CBCC, and they agreed that such stay should be limited to only the issues which CBCC has appealed. American Silicon also moves that the Court's judgment be declared final as to the issues pertaining to the other defendant-intervenors because the issues on appeal pertain only to the calculation of CBCC's dumping margin and no other party has filed a timely appeal. American Silicon states that counsel for CBCC consents to its motion and that government counsel does not object. Thus, it is hereby

ORDERED that the judgment entered on August 27, 2001, in conjunction with Slip Op. 01–109, is stayed with respect to the issues appealed to the United States Court of Appeals for the Federal Circuit by CBCC; and it is further

ORDERED that the United States, its officers, agents, employees, and delegates, are enjoined from liquidating the entries of silicon metal from

Brazil produced or exported by CBCC during the period from July 1, 1994 through June 30, 1995, and covered by the final results of the administrative review from which this action arises, *Silicon Metal from Brazil; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part*, 62 Fed. Reg. 1970 (Jan. 14, 1997), which remain unliquidated at the close of business on the day following the date on which a copy of this order is received; and it is further

ORDERED that the stay and injunction provided by this order shall expire when CBCC has exhausted all levels of appeal provided by law.

In light of the fact that no party other than CBCC has filed an appeal in this action, the judgment entered by the Court on August 27, 2001 is final as to all issues other than those appealed by CBCC.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C02/1 1/15/02 Pogue, J.	Asics Tiger Corp.	94–03–00200	6402.19.90 20% 6404.11.20 10.5% 6402.11.80 90¢/pair + 20% 6404.11.90 20% 6404.19.90 20%	6402.19.10 6% 6403.19.45 8.5% 6403.91.60 8.5% 6403.91.90 10% 6403.99.60 8.5% 6403.99.90 10%	Agreed statement of facts	Long Beach Footwear
C02/02 1/15/02 Pogue, J.	Asics Tiger Corp.	94–04–00201	6402.99.80 90¢/pair +20%	6402.19.10 6%	Agreed statement of facts	Long Beach Footwear
C02/03 1/15/02 Pogue, J.	Asics Tiger Corp.	96–09–02133	6404.10.20 10.5% 6404.11.90 20%	6403.19.40 6.8% 6403.91.60 8.5% 6403.91.90 10% 6403.99.60 8.5% 6403.99.90 10%	Agreed statement of facts	Long Beach Footwear
C02/04 1/16/02 Aquilino, J.	Pickands Mather Sales, Inc.	96–12–02784, 97–7–01261, 98–9–02875	7202.90.50 5%	7202.30.00 3.9%	Agreed statement of facts	Baltimore, New Orleans Ferrosilicomanganese

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